Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL JAMES PERRY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

1. In Texas, whether a capital defendant is executed is contingent on the jury's finding that there is not "a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1) (Vernon Supp. 2004-05). Is submitting this issue to juries without a burden of proof consistent with the protections of the Sixth, Eighth, and Fourteenth Amendments?

2. The Texas Court of Criminal Appeals refuses to review a jury's answer to Texas' mitigation issue. As applied, is Texas' capital sentencing procedure in keeping with the protections of the Eighth and Fourteenth Amendments?

3. Is Texas' limiting instruction on "mitigating evidence," TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(f)(4), contrary to the Sixth, Eighth and Fourteenth Amendments?

PARTIES TO THE PROCEEDING

The parties to the proceeding are **MICHAEL JAMES PERRY**, an individual, and **THE STATE OF TEXAS.**

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE	1
BASIS FOR SUPREME COURT JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	6
ARGUMENT	9
A. The History of Texas' Capital Sentencing Procedure	9
B. Texas' Mitigation Issue Is Unconstitutional	18
C. Texas' Capital Sentencing Statute Unconstitutionally Limits the Mitigating Evidence the Jury May Consider	23
CONCLUSION	30

APPENDIX

Perry v. State, 158 S.W.3d 438 (Tex. Crim. App. 2004) ..... App. 1 – App. 22

Judgment on Jury Verdict of Guilty Death Sentence in *The State of Texas v. Michael James Perry*; Cause No. 02-01-00320-CR; In the District Court of Montgomery County, Texas, 221st Judicial District, filed February 28, 2003 ..... App. 23 – App. 28

TABLE OF CONTENTS – Continued

Page

Order denying motion for new trial in *The State of Texas v. Michael James Perry*; Cause No. 02-01-00320-CR; In the District Court of Montgomery County, Texas, 221st Judicial District, filed April 3, 2003 ..... App. 29

Mandate of Texas Court of Criminal Appeals affirming trial court in *Perry v. State*, 158 S.W.3d 438 (Tex. Crim. App. 2004), dated March 9, 2005 ..... App. 30 – App. 31

Official Notice from Texas Court of Criminal Appeals acknowledging receipt of Mandate on March 14, 2005 ..... App. 32

Official Notice from Texas Court of Criminal Appeals denying motion for rehearing, dated March 9, 2005 ..... App. 33

State's Election to Seek the Death Penalty in *The State of Texas v. Michael James Perry*; Cause No. 02-01-00320-CR; In the District Court of Montgomery County, Texas, 221st Judicial District, filed September 4, 2002 ..... App. 34

Motion to Hold Unconstitutional Article 37.071 Sec. 2(e) and (f) – Burden of Proof in *The State of Texas v. Michael James Perry*; Cause No. 02-01-00320-CR; In the District Court of Montgomery County, Texas, 221st Judicial District, filed May 8, 2002 ..... App. 35 – App. 38

TABLE OF CONTENTS – Continued

Page

Motion to Declare the Texas Capital Sentencing Scheme Unconstitutional and Motion to Preclude Imposition of the Death Penalty in *The State of Texas v. Michael James Perry*; Cause No. 02-01-00320-CR; In the District Court of Montgomery County, Texas, 221st Judicial District, filed February 18, 2003 ..... App. 39 – App. 52

Order Denying Motion to Declare the Texas Capital Sentencing Scheme Unconstitutional and Motion to Preclude Imposition of the Death Penalty in *The State of Texas v. Michael James Perry*; Cause No. 02-01-00320-CR; In the District Court of Montgomery County, Texas, 221st Judicial District, signed February 19, 2003 ..... App. 53

Charge to the Jury in *The State of Texas v. Michael James Perry* No. 02-01-00320-CR; In the District Court of Montgomery County, Texas, 221st Judicial District ..... App. 54 – App. 60

TABLE OF AUTHORITIES

Page

Cases

Addington v. Texas,
441 U.S. 418 (1979) 18

Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy,
367 U.S. 886 (1961) 18

California v. Brown,
479 U.S. 538 (1987) 14

Clemons v. Mississippi,
494 U.S. 738 (1990) 22, 23

Eddings v. Oklahoma,
455 U.S. 104 (1982) 25, 29

Eldridge v. State,
940 S.W.2d 646 (Tex. Crim. App. 1996) (per curiam) 21

Ellason v. State,
815 S.W.2d 656 (Tex. Crim. App. 1991) 17

Furman v. Georgia,
408 U.S. 238 (1972) 10, 11, 19

Gozlon-Peretz v. U.S.,
498 U.S. 395 (1991) 26

Gregg v. Georgia,
428 U.S. 153 (1976) 13

Horizon/CMS Healthcare Corp. v. Auld,
34 S.W.3d 887 (Tex. 2000) 26

In re Winship,
397 U.S. 358 (1970) 19, 20

Jackson v. Virginia,
443 U.S. 307 (1979) 17

TABLE OF AUTHORITIES – Continued

Page

Jurek v. Texas,
428 U.S. 262 (1976) 12, 13, 16, 18, 24

Lockett v. Ohio,
438 U.S. 586 (1978) 25, 29

McFarland v. State,
928 S.W.2d 482 (Tex. Crim. App. 1996) 21

McGinn v. State,
961 S.W.2d 161 (Tex. Crim. App.)
(en banc), *cert. denied*, 525 U.S. 967 (1998) ... 15, 17, 22, 23

Moreno v. State,
755 S.W.2d 866 (Tex. Crim. App. 1988) 17

Morrissey v. Brewer,
408 U.S. 471 (1972) 18

Penry v. Johnson,
532 U.S. 782 (2001) 24, 25

Penry v. Lynaugh,
492 U.S. 302 (1989) ..... *passim*

Perry v. State,
158 S.W.3d 438 (Tex. Crim. App. 2004) 1, 8, 9, 20

Proffitt v. Florida,
428 U.S. 242 (1976) 12

Prytash v. State,
3 S.W.3d 522 (Tex. Crim. App. 1999) 17, 22

Ring v. Arizona,
536 U.S. 584 (2002) 20, 21

Santosky v. Kramer,
455 U.S. 745 (1982) 21, 22

Skipper v. South Carolina,
476 U.S. 1 (1986) 25, 29

TABLE OF AUTHORITIES – Continued

Page

Sumner v. Shuman,
483 U.S. 66 (1987) 19

Woodson v. North Carolina,
428 U.S. 280 (1976) 19

Statutes and Constitutional Authority

28 U.S.C. § 1257(a) 1

TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 2004-05) ..... *passim*

TEX. CODE CRIM. PROC. ANN. art. 44.251(a) (Vernon Supp. 2004-05) 16, 22

TEX. CODE CRIM. PROC. art. 37.071(b) (Vernon Supp. 1975-76) 12

TEXAS PEN. CODE ANN. § 19.03 (Vernon 1974) 9

TEXAS PEN. CODE ANN. § 19.03(a)(2), (5), (8) (Vernon Supp. 2004-05) 10

TEXAS PEN. CODE arts. 1183, 1189, 1256-57, 1408 (1925) 9

U.S. CONST. amend. VI 1

U.S. CONST. amend. VIII 1, 11, 14, 19, 29

U.S. CONST. amend. XIV, § 1 ..... 2, 10, 11, 29

Act of May 17, 1991, 72d Leg., R.S., ch. 838, § 1, 1991 Tex. Gen. Laws 2898, 2899; *see* Tex. C.S.S.B. 880, § 1, 72d Leg., R.S. (1991); Tex. H.B. 9, § 5, 72d Leg., R.S. (1991); Tex. H.B. 1240, § 2, 72d Leg., R.S. (1991) 15

CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

Perry v. State, 158 S.W.3d 438 (Tex. Crim. App. 2004). App. 1 – App. 22.

BASIS FOR SUPREME COURT JURISDICTION

The Texas Court of Criminal Appeals entered its judgment on December 15, 2004. The Court then denied petitioner's motion for rehearing on March 9, 2005. Petitioner seeks review of the Texas Court of Criminal Appeal's judgment on a writ of certiorari. Under 28 U.S.C. § 1257(a), this Court is vested with jurisdiction to review on a writ of certiorari the judgment of the highest state court in which a decision could be had where a right under the United States Constitution is claimed. This is such a case.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1

TEXAS' CAPITAL SENTENCING STATUTE INVOLVED

Sec. 1. If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment.

Sec. 2. (a)(1) If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant's counsel shall be permitted to

present argument for or against sentence of death. The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e) of this article.

(2) Notwithstanding Subdivision (1), evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

(d) The court shall charge the jury that:

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

(2) The court, on the written request of the attorney representing the defendant, shall:

(A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the institutional division of the Texas Department of Criminal Justice for life; and

(B) charge the jury in writing as follows:

"Under the law applicable in this case, if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time.

It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted."

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;

(3) need not agree on what particular evidence supports an affirmative finding on the issue; and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) of this article and a negative finding on an issue submitted under Subsection (e) of this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) of this article or an affirmative finding on an issue submitted under Subsection (e) of this article or is unable to answer any issue submitted under Subsection (b) or (e) of this article, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life.

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals.

(i) This article applies to the sentencing procedure in a capital case for an offense that is committed on or after September 1, 1991. For the purposes of this section, an offense is committed on or after September 1, 1991, if any element of that offense occurs on or after that date.

TEX. CODE CRIM. PROC. ANN. art. 37.071
(Vernon Supp. 2004-05)

STATEMENT OF THE CASE

In late October 2001, Sandra Stotler was shot to death in her home in Conroe, Texas. Her teenage son and one of his friends also were shot and killed in an isolated field a few miles from the house. The petitioner, Michael James Perry, was arrested, along with Jason Burkett, for these murders. Perry confessed to shooting Sandra Stotler, and he implicated Burkett in the deaths of the two boys. Perry was charged with capital murder in the death of Sandra Stotler. He was tried separately from Burkett. At the conclusion of the guilt/innocence stage of the proceedings, a Texas jury found Perry guilty of capital murder.

Perry's trial then turned to the punishment proceedings. Texas' capital sentencing procedure requires that if a defendant has been convicted of a capital offense, the trial court must conduct a separate sentencing proceeding before the same jury that found the defendant guilty. The State and the defense may introduce evidence in the punishment proceeding and present argument for or against the death penalty. The jury is then asked to answer one or two questions. The first question asks jurors "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[1] The jury is then instructed

[1] TEX. CRIM. PROC. ANN. art. 37.071 § 2(b)(1) (Vernon Supp. 2004-05).

that, "if [it] returns an affirmative finding to [that] issue . . . it shall answer"[2] one final issue:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.[3]

By statute, the State must prove beyond a reasonable doubt that the answer to the first question is "yes."[4] *No burden of proof is specified as to the second question.*

Also by statute, a Texas trial judge is directed to instruct the jury on what evidence it may consider with respect to the two questions. As to the first, the jury is to be instructed that "it shall consider evidence admitted at the guilt or innocence stage and the punishment stage, including the evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty."[5] As to the second, the jury is *not* instructed again to consider all the evidence that "militates for or mitigates against the imposition of the death penalty"; rather, the jury is instructed that it "shall consider mitigating evidence to be evidence that a juror might regard as *reducing the defendant's moral blameworthiness.*"[6]

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[2] *Id.* at art. 37.071 § 2(e)(1).

[3] *Id.*

[4] *Id.* at art. 37.071 § 2(c).

[5] *Id.* at art. 37.071 § 2(d)(1).

[6] *Id.* at art. 37.071 § 2(f)(4) (emphasis added).

Perry filed two motions in the trial court challenging the constitutionality of this sentencing procedure. In addition to challenging the constitutionality of the statute under Texas state law, Perry argued that "because the statute is ambiguous as to the exact burden of proof, it provides no meaningful guidance to the juror who is called upon to make this life and death decision."[7] "As a result," Perry argued, "the death penalty is imposed in Texas in a wanton and inconsistent manner, in violation of [his] rights to due process and protection from cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution."[8] Perry also argued that Texas' capital sentencing scheme "is unconstitutional because it does not permit meaningful appellate review[.]"[9] And Perry argued that the statutory definition of "'mitigating evidence' is unconstitutionally narrow."[10] The trial court denied the motions.[11]

On appeal to the Texas Court of Criminal Appeals, Perry argued that, under this Court's precedent, "the trial court should have instructed the jury that the State was required to prove beyond a reasonable doubt that the jury should answer 'no' to the mitigation special issue."[12] Perry also argued that the statutory definition of mitigating evidence impermissibly narrowed the circumstances the jury should consider.[13] The Texas Court of Criminal Appeals

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[7] App. 35 and 39.

[8] *Id.*

[9] App. 43.

[10] App. 45.

[11] App. 53.

[12] *Perry v. State*, 158 S.W.3d 438, 446 (Tex. Crim. App. 2004)

[13] *Id.* at 449.

rejected both arguments and affirmed Perry's death sentence.[14]

ARGUMENT

The history of Texas' capital sentencing procedure is intertwined with this Court's decisions on the subject, and the constitutional shortcomings of the current procedure are best understood against the backdrop of that history. It is, therefore, important to trace the evolution of Texas' procedure, before turning to the reasons that the current Texas procedure fundamentally fails to conform to constitutional guarantees.

A. THE HISTORY OF TEXAS' CAPITAL SENTENCING PROCEDURE

Texas has used capital punishment since it was a Republic. The range of capital offenses was wide for much of the twentieth century, narrowed in the 1970s, and has since expanded. For many years, the Texas Penal Code made all murders capital offenses, and also made rape and armed robbery capital crimes.[15] By the mid-1970s, the Texas Penal Code had dropped rape and armed robbery and limited capital offenses to intentional and knowing murders committed in five situations: murder of a police officer or fireman; murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee.[16] Since then, the list of capital offenses has been expanded to include murder of

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[14] *Id.* at 448-49.

[15] TEXAS PEN. CODE arts. 1183, 1189, 1256-57, 1408 (1925).

[16] TEXAS PEN. CODE ANN. § 19.03 (Vernon 1974).

a child, additional murders while imprisoned, and murders in the course of committing or attempting to commit obstruction or retaliation or terroristic threat.[17]

In 1972, in *Furman v. Georgia*,[18] the Court addressed Texas' and Georgia's capital sentencing procedures. Elmer Branch was sentenced to death in Texas for the crime of rape.[19] The Court reviewed Branch's death sentence, as well as the capital sentences of two Georgia defendants, to determine whether the "imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[20] Five Justices answered this question affirmatively, each supporting his conclusion in a separate opinion.[21] After exhaustive historical and legal analyses, Justices Brennan and Marshall concluded that capital punishment itself was unconstitutional under the Eighth and Fourteenth Amendments.[22] Justice Stewart found it unnecessary to reach this ultimate issue, concluding instead that the infrequently utilized and discretionary Georgia and Texas capital procedures permitted death sentences to be "wantonly" and "freakishly" imposed, were cruel and unusual in the same way that "being struck by lightning is cruel and unusual," and hence violated the

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[17] TEXAS PEN. CODE ANN. § 19.03(a)(2), (5), (8) (Vernon Supp. 2004-05).

[18] 408 U.S. 238 (1972) (per curiam).

[19] *Id.* at 239 (1972).

[20] *Id.* at 239-40.

[21] *Id.*

[22] *Id.* at 257-306 (Brennan, J., concurring in judgment); *Id.* at 314-74 (Marshall, J., concurring in judgment).

Eighth and Fourteenth Amendments.[23] Justice White determined that the infrequent (and seemingly random) imposition of capital punishment under the discretionary Georgia and Texas capital statutes, as then administered, made the threat of execution too attenuated to be of substantial service to criminal justice and thus rendered the death sentences at issue cruel and unusual.[24] Justice Douglas' conclusion was that the Georgia and Texas discretionary statutes were unconstitutional in their operation in that they were "pregnant with discrimination" which was incompatible with the concept of equal protection implicit in the "cruel and unusual" punishment prohibition.[25]

The Texas Legislature responded to *Furman* by narrowing the class of capital offenses to certain categories of murder and by adopting procedures to guide juries in capital sentencing. If a verdict was returned finding a person guilty of one of these categories of murder, Texas' revised capital sentencing procedure then required a separate punishment proceeding, with additional evidence and argument, after which the jury was asked to answer two, and possibly three, questions:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

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[23] *Id.* at 306-10 (Stewart, J., concurring in judgment).

[24] *Id.* at 310-14 (White, J., concurring in judgment).

[25] *Id.* at 240-57 (Douglas, J., concurring in judgment).

> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[26]

The State bore the burden of proof on each of the three questions to prove beyond a reasonable doubt that the answer was yes. If the jury answered yes to each of the questions, the death sentence was imposed.[27] A no answer to any of the questions required a life sentence.[28] The statute then provided for expedited appellate review by the Texas Court of Criminal Appeals.[29]

In 1976, this Court examined the constitutionality of Texas' modified capital sentencing statute in *Jurek v. Texas*.[30] Upholding this procedure, the Court pointed to the Texas Court of Criminal Appeals' assurance that a defendant would be permitted to "bring to the jury's attention whatever mitigating circumstances" he wished to present.[31] The Court also relied on the Texas Court of Criminal Appeals' precedent for reviewing "the sufficiency of the evidence" presented during sentencing.[32] On this latter point, the Court explained that, "[*b*]*y providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law.*"[33] Against this backdrop,

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[26] TEX. CODE CRIM. PROC. art. 37.071(b) (Vernon Supp. 1975-76).

[27] *Id.* at art. 37.071(c), (e).

[28] *Id.*

[29] *Id.* at art. 37.071(f).

[30] 428 U.S. 262 (1976).

[31] *Id.* at 272.

[32] *Id.* at 273 (citing *Smith v. State*, No. 49,809 (Feb. 18, 1976)).

[33] *Jurek*, 428 U.S. at 276 (emphasis added); *see also Proffitt v. Florida*, 428 U.S. 242, 251 (1976) ("the Supreme Court of Florida like its Georgia counterpart considers its function to be to [guarantee] that

(Continued on following page)

the Court found that the Texas "system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed" and, therefore, "it does not violate the Constitution."[34]

In *Penry v. Lynaugh*[35] (*Penry I*), the Court reexamined the adequacy of these three statutorily-mandated jury questions. The defendant had offered extensive evidence that he was mentally retarded and had been severely abused as a child; however, the jury was never instructed that it could consider and give effect to that mitigating evidence in imposing a sentence.[36] Additionally, the three jury questions did not in themselves adequately allow for the jury to consider and give effect to this evidence. While the defendant's retardation was potentially relevant to the first issue – whether he acted deliberately – the Court found there was no way to be sure that the jurors fully considered the evidence since it bore on the broader question of moral culpability.[37] Turning to the second issue

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the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.") (internal quotations omitted); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) ("[A]n important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for [the] automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.")

[34] *Jurek*, 428 U.S. at 276.

[35] 492 U.S. 302 (1989).

[36] *Id.* at 320.

[37] *Id.* at 322-23.

– whether the defendant would be a future danger – the evidence of his mental retardation and background was pertinent only as an aggravating factor.[38] The evidence simply was not relevant to the third issue – whether the defendant has unreasonably responded to provocation.[39] The Court also noted that the prosecutor discouraged the jury from giving effect to the defendant's mitigating evidence.[40]

The Court held that the defendant had been sentenced to death in violation of the Eighth Amendment because the jury had not been adequately instructed with respect to mitigating evidence. "In light of the prosecutor's argument, and . . . in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of [the defendant's] mental retardation and abused background by declining to impose the death penalty," the Court concluded that a "reasonable juror could well have believed that there was no vehicle for expressing the view that [the defendant] did not deserve to be sentenced to death based upon his mitigating evidence."[41] The Court explained that in a capital case "[t]he sentencer must . . . be able to consider and give effect to [mitigating] evidence in imposing sentence," so that "'the sentence imposed . . . reflec[ts] a reasoned *moral* response to the defendant's background, character, and crime.'"[42]

In response to *Penry I*, the Texas Legislature revised the State's capital sentencing procedure. The Legislature deleted the first and third special issues in the existing

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[38] *Id.* at 323.

[39] *Id.* at 324-25.

[40] *Id.* at 325.

[41] *Id.* at 326, 328.

[42] *Id.* at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original).

three question inquiry regarding deliberate conduct and provocation, respectively.[43] As to the "continuing threat" inquiry, which was retained, the Legislature added a required instruction that the jury should "consider all evidence admitted at the guilt [and] punishment stage[s], including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty."[44] The Legislature also added what has been labeled "the *Penry* issue,"[45] which the jury reaches only if it "returns an affirmative finding" on the continuing threat issue.[46] The *Penry* issue asks the jury to determine:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.[47]

Like the continuing threat issue, the Legislature directed that this new issue be accompanied by an instruction. But unlike the continuing threat issue, the jury is *not*

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[43] Act of May 17, 1991, 72d Leg., R.S., ch. 838, § 1, 1991 Tex. Gen. Laws 2898, 2899; *see* Tex. C.S.S.B. 880, § 1, 72d Leg., R.S. (1991); Tex. H.B. 9, § 5, 72d Leg., R.S. (1991); Tex. H.B. 1240, § 2, 72d Leg., R.S. (1991).

[44] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d)(1) (Vernon Supp. 2004-05).

[45] *McGinn v. State*, 961 S.W.2d 161, n.1 (Tex. Crim. App.) (en banc) (Baird, J., concurring and dissenting), *cert. denied*, 525 U.S. 967 (1998).

[46] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (Vernon Supp. 2004-05).

[47] *Id.*

instructed again to consider all the evidence that "militates for or mitigates against the imposition of the death penalty"; instead, the jury is instructed that "mitigating evidence" is that evidence which "a juror might regard as *reducing the defendant's moral blameworthiness.*"[48] Also in contrast to the continuing threat issue, the *Penry* issue does not hold the State to the reasonable doubt standard; rather the *Penry* issue is altogether silent on the standard of proof.

If the jury answers no to the continuing threat issue, the punishment proceeding concludes and the defendant is sentenced to life imprisonment.[49] If the jury answers yes to the continuing threat issue, then it proceeds to answer the *Penry* issue.[50] Failure to answer the continuing threat issue or the *Penry* issue requires the trial court to sentence the defendant to life imprisonment.[51]

In overhauling the Texas capital sentencing procedure, the Texas Legislature seemingly nodded to this Court's concern in *Jurek* for meaningful appellate review. The Legislature charged the Texas Court of Criminal Appeals with the responsibility for reforming death sentences to life sentences where the evidence did not justify death. More particularly, the Legislature mandated that "[t]he court of criminal appeals *shall* reform a sentence of death to a sentence of confinement in the institutional division of the Texas Department of Criminal Justice for life if the court finds that there is *insufficient evidence* to support an affirmative answer [to the continuing threat issue] or a negative answer [to the *Penry* issue]."[52]

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[48] *Id.* at art. 37.071 § 2(f)(4) (emphasis added).

[49] *Id.* at art. 37.071 § 2(g).

[50] *Id.* at art. 37.071 § 2(e)(1).

[51] *Id.* at art. 37.071 § 2(g).

[52] TEX. CODE CRIM. PROC. ANN. art. 44.251(a) (Vernon Supp. 2004-05) (emphasis added).

The history of the Texas Court of Criminal Appeals reveals that it is less than assiduous in reviewing the sufficiency of the evidence in capital sentencing proceedings. As for negative answers to the *Penry* issue, the Court has repeatedly announced that it "does *not* conduct a sufficiency review of the mitigation special issue."[53] In like manner, the Court "declin[es] to conduct a factual sufficiency review of the 'future dangerousness' special issue[.]"[54] While the Texas Court of Criminal Appeals pledges its faithfulness to the "*Jackson v. Virginia*[55] 'rationality' standard of reviewing the sufficiency of the evidence to support the jury's answer to the 'future dangerousness' special issue,"[56] in more candid moments the Court acknowledges that this review is "lip service."[57] The accuracy of this self-assessment is confirmed by the fact that the Court has not reformed a death sentence based on inadequate evidence of "future dangerousness" since the early 1990s.[58] The Court has *never* reformed a sentence based on inadequate evidence to support a negative *Penry* issue answer.

This history of Texas' capital sentencing procedure makes two points that bear on an assessment of the

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[53] *McGinn v. State*, 961 S.W.2d at 166 (citation omitted) (emphasis added); *see also Prytash v. State*, 3 S.W.3d 522, 536 (Tex. Crim. App. 1999) ("the normative decision of the jury as to the mitigation special issue is not amenable to appellate review").

[54] *McGinn v. State*, 961 S.W.2d at 171 (McCormick J., concurring); *see also id.* at 169 ("We hold that a factual sufficiency review of a jury's determination of a probability of future dangerousness is not required by the Texas Constitution.") (majority opinion).

[55] 443 U.S. 307 (1979).

[56] *McGinn v. State*, 961 S.W.2d at 171 (McCormick J., concurring).

[57] *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988).

[58] *See Ellason v. State*, 815 S.W.2d 656, 664 (Tex. Crim. App. 1991).

State's current procedure. First, while nearly thirty years ago this Court relied on the Texas Court of Criminal Appeals' review as "a means to promote the evenhanded, rational, and consistent imposition of death sentences,"[59] it can no longer do so. Second, where the State formerly was required to clear the reasonable-doubt hurdle three times in capital sentencing in order to secure a death sentence, it now only must clear that hurdle once, leaving the remaining *Penry* issue entirely to the jury's unbounded (and unreviewable) discretion.

B. TEXAS' MITIGATION ISSUE IS UNCONSTITUTIONAL

Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances."[60] Instead, "due process is flexible and calls for such procedural protections as the particular situation demands."[61] The standard of proof's function in providing one such procedural protection is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[62] The standard of proof, therefore, serves "[i] to allocate the risk of error between the litigants and [ii] to indicate the relative importance attached to the ultimate decision."[63] Guided by these principles, the

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[59] *Jurek*, 428 U.S. at 276.

[60] *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961) (internal quotations omitted).

[61] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

[62] *Addington v. Texas*, 441 U.S. 418, 423 (1979) (internal quotations omitted).

[63] *Id.*

necessity of a reasonable-doubt standard for Texas' *Penry* issue is apparent.

Only that standard can adequately allocate the risk of error between a defendant and the State. Death, after all, is unique. As this Court put it, "[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."[64] Furthermore, an overarching principle of constitutional death penalty jurisprudence is that, "[b]ecause of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[65] The Eighth Amendment requires "heightened reliability . . . in the determination whether the death penalty is appropriate."[66]

Only the reasonable doubt standard can adequately impress upon jurors the significance and solemnity of their decision between life and death. As this Court has pointed out, the reasonable doubt standard is "indispensable" to due process in criminal proceedings, because "it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."[67] The Court also noted that the standard was "indispensable to command the respect and confidence of the community in applications

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[64] *Furman v. Georgia*, 408 U.S. at 306.

[65] *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (footnote omitted).

[66] *Sumner v. Shuman*, 483 U.S. 66, 72 (1987).

[67] *In re Winship*, 397 U.S. 358, 364 (1970) (internal quotations omitted; emphasis added).

of the criminal law" since the moral force of the law could be "diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[68]

In *Ring v. Arizona*,[69] this Court made it clear that the reasonable doubt standard applies not only to guilt/innocence proceedings, but also to sentencing. The Court mandated that, "[*i*]*f a State makes an increase in defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.*"[70] In rejecting petitioners' appeal, however, the Texas Court of Criminal Appeals found that Texas' *Penry* issue is exempt from this requirement. According to the Texas Court, the requirement is inapplicable "because a defendant is *already eligible for a death sentence* by the time the jury reaches the mitigation special issue and, therefore, *a 'no' answer* [*will*] *not increase the punishment.*"[71]

This conclusion cannot be squared with Texas' statutory sentencing statute. Under the statute, if the jury answers yes to the continuing threat issue, it then proceeds to answer the *Penry* issue.[72] "If the jury . . . is *unable* to answer"[73] the *Penry* issue, the statute does *not* permit the trial court to sentence the defendant to death; rather, the statute mandates that the trial "court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life."[74] And, of course, if the jury answers the *Penry* issue in the

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[68] *Id.*

[69] 536 U.S. 584 (2002).

[70] *Id.* at 602.

[71] *Perry v. State*, 158 S.W.3d at 447 (emphasis added).

[72] TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1).

[73] *Id.* at 37.071 § 2(g).

[74] *Id.*

affirmative – that is, it finds sufficient mitigating circumstances – the trial court likewise must sentence the defendant to life imprisonment.[75] The *only* circumstance under which the jury may impose the death sentence is "[i]f the jury returns . . . a negative finding" on the *Penry* issue.[76] Only then "shall [the court] sentence the defendant to death."[77] Thus, the "State makes an increase in a defendant's authorized punishment" from life imprisonment to death "contingent on" a negative answer to the *Penry* issue; therefore "that fact . . . must be found by a jury beyond a reasonable doubt."[78]

In other opinions, the Texas Court of Criminal Appeals has justified the absence of a standard of proof on the grounds that the *Penry* "issue is a moral, normative one . . . which [calls for] the jurors themselves [to] decide what is mitigating evidence and the extent to which that evidence is mitigating."[79] According to the Texas Court, a standard of proof cannot be applied to a moral judgment.[80] The subjectivity of the *Penry* issue, however, does not exempt it from the protections of Due Process.

That point was decisively made by this Court in *Santosky v. Kramer*.[81] The Court considered what burden of proof was necessary in parental termination proceedings which "employ imprecise substantive standards that

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Ring v. Arizona*, 536 U.S. at 602.

[79] *Eldridge v. State*, 940 S.W.2d 646, 654 (Tex. Crim. App. 1996) (per curiam); *see also McFarland v. State*, 928 S.W.2d 482, 498-99 (Tex. Crim. App. 1996).

[80] *Eldridge v. State*, 940 S.W.2d at 654.

[81] 455 U.S. 745 (1982).

leave determinations *unusually open* to the *subjective values* of the judge."[82] As a result, the trial "court possesses unusual discretion to underweigh probative facts that might favor the parent."[83] This Court did not find that the subjectivity of these assessments, and their necessarily moral dimension, excepted them from Due Process protections; rather, the Court determined that this subjectivity, coupled with the superior resources of the State, "*magnif[ied]* the risk of erroneous factfinding"[84] and therefore militated in favor of a *higher standard* of proof (which the Court found to be the clear and convincing standard, rather than the preponderance standard).[85]

Texas' capital sentencing scheme, as it is actually applied, falls short of the Due Process guarantee in another respect. This is because the jury's unbridled discretion in answering the *Penry* issue is unchecked by *any* appellate review. As noted above, although a Texas statute mandates review,[86] the Texas Court of Criminal Appeals declines to revisit *Penry* issue findings.[87]

In *Clemons v. Mississippi*, this Court observed that "[a]n automatic rule of affirmance in a weighing State would be invalid . . . , for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances."[88] The Texas Court of Criminal Appeals maintains that "*Clemons* has no application to Texas' capital sentencing scheme" because "Texas is not a 'weighing'

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[82] *Id.* at 762 (emphasis added).

[83] *Id.* (footnote omitted).

[84] *Id.*

[85] *Id.* at 746 (emphasis added).

[86] TEX. CODE CRIM. PROC. ANN. art. 44.251(a).

[87] *McGinn v. State*, 961 S.W.2d at 166; *Prytash v. State*, 3 S.W.3d at 536.

[88] 494 U.S. 738, 752 (1990).

state."[89] But in asking juries whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed,"[90] Texas necessarily asks jurors to weigh the evidence; after all, whether the evidence warranting a life sentence is "sufficient" can only be determined by comparing it to, or weighing it against, the evidence militating for a death sentence.

As noted above, the Texas Court of Criminal Appeals also declines to make any meaningful review of a jury's future dangerousness finding. The lack of any review of both sentencing issues results in the "automatic rule of affirmance"[91] that violates Due Process.

C. TEXAS' CAPITAL SENTENCING STATUTE UNCONSTITUTIONALLY LIMITS THE MITIGATING EVIDENCE THE JURY MAY CONSIDER

The instruction in the Texas capital sentencing statute designed to guide the jury's consideration of mitigating evidence unconstitutionally precludes the jury from considering and giving effect to all relevant evidence.[92] The statute's supplemental instruction limiting mitigating evidence to "evidence that a juror might regard as reducing the defendant's moral blameworthiness" impermissibly instructs jurors to disregard an important class of mitigating evidence when considering the mitigation special issue.

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[89] *McGinn v. State*, 961 S.W.2d at 171 (McCormick, J., concurring).

[90] TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1) (Vernon Supp. 2004-05).

[91] *Clemons v. Mississippi*, 494 U.S. at 752.

[92] TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(f)(4) (Vernon Supp. 2004-05).

In the punishment stage, the jury could find that Perry would constitute a continuing threat only after considering "evidence of [Perry]'s background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty."[93] Prior to Texas' use of the mitigation special issue, in *Penry I*, this Court recognized that "the facial validity of the Texas death penalty statute had been upheld in *Jurek* on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider *all* of the relevant mitigating evidence a defendant might present."[94]

In *Penry v. Johnson*[95] (*Penry II*), this Court confronted the same issues that had been put to the jury in *Penry I*, but now accompanied by additional instructions that, among other things, instructed the jury on how they should consider and give effect to mitigating circumstances.[96] The most significant of the supplemental instructions was the direction that if the jury "determine[d], when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues."[97] This Court again reversed the defendant's death sentence. In doing so, the Court pointed out that "the *key* under *Penry I* is that the jury be able to 'consider and give effect to [a defendant's mitigating] evidence in

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[93] *Id.* at 37.071 § 2(d)(1).

[94] *Penry I*, 492 U.S. at 318 (emphasis added).

[95] 532 U.S. 782 (2001).

[96] *Id.* at 790.

[97] *Id.* at 790 (internal quotation omitted).

imposing a sentence."[98] The conflict between the three special issues and the supplemental instruction meant that it was "logically and ethically impossible for a juror to follow both sets of instructions."[99] Because of the "reasonable likelihood" that the jury applied the instructions in a manner that foreclosed their consideration of the defendant's mitigating evidence, the Court found the supplemental instruction to be "an inadequate vehicle for the jury to make a reasoned moral response to [the defendant's] mitigating evidence."[100]

Texas' "mitigating evidence" instruction fails for the same reason. Under the current scheme the jury is *not* instructed – as it is under the continuing threat issue – to consider all the evidence that "militates for or against the imposition of the death penalty"; instead, the jury is instructed that "mitigating evidence" is only that evidence which "a juror might regard as *reducing the defendant's moral blameworthiness.*"[101] This instruction violates the *Penry II* decision and this Court's repeated decisions affirming that all mitigating evidence is relevant at capital sentencing.[102]

Given that the mitigation special issue already instructs jurors to consider the mitigating circumstances of the offense, including the defendant's character, background, and personal moral culpability, the only way for a

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[98] *Id.* at 797 (citations omitted; emphasis added).

[99] *Id.* at 799.

[100] *Id.* at 800.

[101] TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(f)(4) (Vernon Supp. 2004-05) (emphasis added).

[102] *Lockett v. Ohio*, 438 U.S. 586, 608 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 113-17 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 8-9 (1986); *Penry I*, 492 U.S. at 318.

reasonable juror to read the moral blameworthiness instruction is as a limiting one. Any other reading would render the supplemental instruction superfluous. Moreover, the more general language of the *Penry* issue does not save the Texas statute's constitutionality. The common sense reading of the jury instruction is that the specific "moral blameworthiness" definition of "mitigating evidence" controls over the more general language in the *Penry* issue.[103]

In practice, the limiting instruction negates the *Penry* issue's requirement that the jury consider broad categories of mitigating evidence. The following exchange in Perry's trial between the prosecution and one of the jurors who served on Perry's jury shows why:

> Prosecutor: Okay. Let's go on to Special Issue No. 2. Okay. That's a little bit more – in my opinion, a little bit difficult one to look at from the standpoint of explanation. Okay? And as I told you, we don't – nobody has the burden on that issue. We have no burden. Okay? We don't have to prove that issue to you beyond a reasonable doubt.
>
> I'm going to kind of go through this in a way that hopefully it will make a little bit more sense as it was explained to me a few years ago. Okay? The way I have to do it is it's a little bit difficult and rough reading is to break this down into two parts. Okay?
>
> Juror: Uh-huh.

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[103] *See Gozlon-Peretz v. U.S.*, 498 U.S. 395, 407 (1991) ("A specific [statutory] provision controls over one of more general application."); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) ("more specific statute controls over the more general").

Prosecutor: And what I am going to ask you to do is read the question first to yourself. Okay? Are you all right?

Juror: Uh-huh.

Prosecutor: Okay. And stop right here (indicating). Okay? Okay.

Juror: All right.

Prosecutor: ***I can see a little bit of puzzlement. Everybody has that look about them when they read that issue.*** But that first half, would you agree with me it talks about what you are to consider, what you get to consider, right?

Juror: Right.

Prosecutor: Talks about considering all of the evidence including the circumstances of the offense, the defendant's character and background and the personal moral culpability of the defendant. That's telling you what you can consider, right?

Juror: Yes.

Prosecutor: Okay. What does – if you don't mind me asking you, what do you think personal moral culpability refers to?

Juror: That's what I was going to ask you exactly.

Prosecutor: Tell me if you would agree with me. This would be my suggestion. It talks about a person's responsibility for the crime. Would you agree with me ***when you talk about personal moral culpability that's what we're talking about, responsibility for the crime***?

Juror: I guess I'm not sure about the word "culpability."

Prosecutor: Blameworthy. That would be a good – I guess a synonym for culpability. Moral blameworthiness. Okay?

Juror: Okay. Yes.[104]

The statute and the prosecution's explanation misguided the juror into considering only that mitigating evidence that went to Perry's "responsibility" for the crime he had just been found to have committed. "Responsible" means "liable to be called on to answer" or "to be called to account as the primary cause, motive, or agent."[105] Because the jury had already concluded that Perry was guilty (*i.e.*, responsible), under the statute there was nothing left for them to consider when they answered the *Penry* issue.

Reasonable, law abiding, and conscientious jurors like the one described above could have equated moral blameworthiness with being guilty of committing the crime without legal justification or excuse. Or perhaps they drew the line elsewhere. Jurors may have concluded that Perry's well-documented evidence of family mental illness or drug and alcohol abuse had no bearing on his moral blameworthiness for the murder he committed. This is more likely considering the prosecution's argument to the jury that they should not consider such evidence as mitigating factors.[106] If so, the jury would have improperly disregarded much of his legitimate mitigation case.

Furthermore, even if the moral blameworthiness instruction was not actually intended to narrow the scope of mitigating evidence that jurors are permitted to consider,

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[104] Reporter's Record Vol. 7, pp. 36-38 (Voir dire of juror Gibson by Prosecutor Bluestein) (emphasis added).

[105] Merriam-Webster Online Dictionary, available at http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=responsible accessed on June 5, 2005.

[106] Reporter's Record Vol. 27, p. 58 ("But what she talked about was the family tree, the genetic history. You think about that. These offenses are not alcohol-related offenses. They are not drug-related offenses. So that just doesn't float here, folks. That's just smoke. That's just something you want to get hung up on.").

statutory authority to present mitigating evidence alone is not enough if – as in Perry's case – the jury may have believed that it could not consider some of that evidence in imposing the sentence.[107] And under this Court's precedent, "[t]he sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."[108]

In the absence of a jury instruction defining "moral blameworthiness" in a way that would clearly direct the jury to fully consider petitioner's mitigating evidence, this Court "cannot be sure" that the jury was able to give full consideration and effect to his evidence.[109] An instruction from the trial judge explicitly limiting the jury's consideration of mitigating circumstances to evidence that reduces petitioner's moral blameworthiness for the crime creates, at the very least, a reasonable likelihood that jurors would indeed follow that instruction and disregard evidence they did not consider relevant to the defendant's moral blameworthiness. The prosecutor's further explanation of the statute and his closing argument increases that likelihood. By giving that instruction, the trial court created a reasonable likelihood and impermissible risk that an entire category of petitioner's mitigating evidence would be placed beyond the effective reach of the jury in violation of the Eighth and Fourteenth Amendments.[110]

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[107] *Eddings v. Oklahoma*, 455 U.S. at 118-19 (O'Connor, J., concurring).

[108] *Id.* at 114-15.

[109] *Penry I*, 492 U.S. at 323.

[110] *Id.*; *Lockett v. Ohio*, 438 U.S. at 608; *Eddings v. Oklahoma*, 455 U.S. at 113-17; *Skipper v. South Carolina*, 476 U.S. at 8-9.

CONCLUSION

Death is the ultimate sentence. No issue is more compelling or more worthy of this Court's attention than the constitutionality of the procedures for imposing that sentence. For the reasons stated above, Texas' procedure fundamentally fails the Constitution's guarantees. Petitioner Michael James Perry therefore respectfully prays that this Honorable Court grant a writ of certiorari and review the judgment of the Texas Court of Criminals Appeals.

Dated: June 7, 2005

Respectfully submitted,

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438 Tex. 158 SOUTH WESTERN REPORTER, 3d SERIES

Michael James PERRY, Appellant,

v.

The STATE of Texas.

No. AP-74591.

Court of Criminal Appeals of Texas.

Dec. 15, 2004.

Danny K. Easterling, Houston, for Appellant.

Gail Kikawa McConnell, Asst. District Attorney, Conroe, Matthew Paul, State's Attorney, Austin, for State.

OPINION

HERVEY, J., delivered the opinion of the Court in which KELLER, PJ., MEYERS, PRICE, WOMACK, KEASLER, HOLCOMB, and COCHRAN, JJ., joined.

A jury convicted appellant of capital murder. The trial court sentenced appellant to death pursuant to the jury's answers to the special issues submitted at the punishment phase. Appellant raises seven points of error in his original brief and another point of error in a supplemental brief. We affirm.

Appellant does not challenge the sufficiency of the evidence to support his conviction. The evidence shows that appellant murdered the victim by shooting her with a shotgun while appellant and another person were burglarizing her home. Later that night appellant was involved in the murder of this victim's son and another person. Appellant was arrested about a week later in an apartment where he had fled following a high-speed car-chase with

the police during which appellant injured his arm, and one of the other occupants in the car was shot by the police in an exchange of gunfire. The injury to appellant's arm was serious enough to require treatment at a hospital. The police obtained a written confession from appellant at the hospital.

Appellant was charged and tried only for the murder of the mother during the burglary of her home. Appellant testified at the guilt/innocence phase that he was not involved in this murder and that his confession was not true. The following portion of appellant's confession was admitted into evidence at the guilt/innocence phase:

> Last week, the week of October 22-26, my friend, Jason Burkett, and I decided we needed to get a vehicle, or two vehicles. We both know a younger white male [the burglary victim's son], known to us as Adam Stotler whose parents have a lot of money. They also have a newer Camaro and Isuzu Rodeo.
>
> On Wednesday 10-24-01 Jason and I made a plan that we were going to ask to spend the night with Adam at his house, and we were going to take the Camaro in the middle of the night while Adam and his mom was [sic] sleeping. We went to Adam's house at about 7 pm on Wednesday 10-24-01. Jason was driving his girlfriend, Kristen Ranel's, blue Chevy truck, and I was riding in the passenger seat. We had a 12 gauge shotgun with us. Jason and I got to Adams [sic] house, and his mom told us that Adam was not home, that he was at the skate park and would be home around 9 pm.
>
> Jason and I left in the truck, but before we got out of the subdivision, Jason said that it would

be easier to get the car with only one person home. Jason and I then made a plan that Jason would knock on the front door, and I would sneak in the back door, through the garage with the shotgun. We went to Adam's house on foot and left Kristen's truck down the road. I walked around to the side of the house through the garage, and Jason knocked on the front door and asked to use the phone. When I heard Jason talking on the phone, I went into the house through the back door in the garage. Once in the house, I hid in the laundry room between the kitchen and garage. I then knocked on the back door, and when Adam's mom came to the back door, I shot her one time in the side near her back with the shotgun. She fell to the floor, and I dropped the shotgun.

She then moved or tried to get up or something, and I grabbed the shotgun and shot her one more time. She fell to the floor in front of the laundry room and garage, back door. Jason freaked out and ran to the front door and opened the door. We calmed down a little and grabbed the blankets and sheet off of the bed in the bedroom near the kitchen and put the blankets and sheet over her because we did not want to look at her. Jason ran and got Kristen's truck and brought it back to Adam's house. Jason backed the truck into the garage, and we dragged Adam's mom's body and the blankets out into the garage, where we loaded her into the back of the truck with the blankets and sheet. I could not find the keys to the Camaro, and I remembered that the inspection sticker was expired, and Adam's mom never drove it.

Jason then got into the drivers [sic] side of the truck and I got in the passenger seat, and Jason

> drove to an area he called Crater Lake. I did not know where Crater Lake was, but I remember driving down a dirt road, then going across a big bump and seeing some type of pipeline or something. We then drove down a cleared road and saw an old stripped out truck blocking the road. The road to what Jason called Crater Lake was off to the left of the stripped truck. Jason turned the truck around and first tried to open the tailgate, speed backwards toward the pond, and try to slam on the brakes to get the body to slide out. He did that I think twice, but it would not work so we grabbed her body, and we rolled her down into the water. Jason and I then threw sheets into the water on top of her and covered her up with some sticks and brush we found near by. It was about 8:20-8:30 pm by that time, and we drove to pick up Kristen, where she works at Big Dog Sports at the Outlet Mall in Conroe.
>
> I jumped the fence and ran to Adam's house. I got in the Camaro, which was parked in the garage and drove it out of the garage. I pressed the button to close the garage door, but it would not close so I drove off. I drove out of the gate, met Jason, and we left to go to our trailer. Jason drove the white Isuzu with the shotgun in it, and I drove the red Camaro. We went home, smoked several cigarettes, and then got cleaned up and went to Nite Life.

The rest of appellant's confession was admitted into evidence at the punishment phase of the trial.

> We picked up Kristen and drove back to Adam's subdivision. Jason drove, Kristen sat in the middle, and I sat on the passenger's side. We still had the shotgun with us. When we got to the subdivision, we could not get in, because we did

not know the gate code. We knew that Adam would be home soon so we waited at the gate, and Adam pulled up in the white Isuzu Rodeo with another guy I know as Jeremy in the passenger seat. While Jason, Kristen, and I waited at the gate for Adam, we agreed on a story to tell Adam. Jason and I told Adam and Jeremy that a friend of ours had shot himself while we were all hunting squirrels, and we needed their help to get him.

We left the front of the subdivision and turned right onto the road in front of the subdivision. We were still in the truck, and Adam and Jeremy followed us in the Isuzu Rodeo. We then came to a stop sign and turned right. We then took the first left off that road and crossed the railroad tracks. We drove down a dark, winding road and stopped at I think was the first dirt road on the left. We all parked there, and Jason, Jeremy, Adam, and I started walking back into the woods off the dirt road. Kristen sat in her truck. After we walked awhile, Adam realized where we were and said that he knew an easier way to get to our friend.

Adam and I went back to Adams [sic] Isuzu, and Jason and Jeremy stayed in the woods. Adam drove me in his Isuzu to the 1st subdivision on the left off of the same road we were on. Adam said that there was a road that went into the area we had earlier walked to. I think we turned onto the first road on the left in that subdivision and stopped at a cul-de-sac.

Adam and I got out of the Isuzu and we saw Jason walking toward us with the shotgun. Jason asked if we heard the gunshots and said that he was trying to let us know where he was. I told him that I had heard two to three shots. Adam

then walked toward Jason, who did not have Jeremy with him, and Jason told him that he (Jason) would take Adam to where the others supposedly were. I walked back to get my cigarettes, and I saw Jason shoot Adam in the left side. I then covered my eyes. I heard a second gunshot and uncovered my eyes. I then saw Jason lean in close to Adam and fire a third shot at close range. I walked over to Adams [sic] body and got his car keys out of his pocket.

Jason and I then went to the Isuzu, and Adam [sic] got in the drivers [sic] side with me in the passenger side. We went back to where Kristin [sic] was waiting, and Kristen asked Jason, "What happened" and then said, "Never mind I don't want to know." Jason then said, "You're right, you don't want to know." Kristen's sister called, and Kristen was upset and said she was going home. Kristen left in her truck, and Jason drove me back to Adam's subdivision.

I took the keys to the Camaro off of Adam's key ring for the Isuzu, and I jumped the fence and ran to Adam's house. I got in the Camaro, which was parked in the garage and drove it out of the garage. I pressed the button to close the garage door, but it would not close so I drove off. I drove out of the gate, met Jason, and we left to go to our trailer. Jason drove the white Isuzu with the shotgun in it, and I drove the red Camaro. We went home, smoked several cigarettes, and then got cleaned up and went to Nite Life.

The shotgun we used came from a burglary that Jason and I did on Ave. E by the Salvation Army. Jason and I both know the homeowner, and he drives a green Ford Ranger. We took a Glock .40 and a 12 gauge defender out of the house. The 12

> gauge defender is the shotgun we used to kill Adam's mom, Adam Stotler, and Jeremy.
>
> I also took Adam's wallet out of his Isuzu with his driver's license.

In point of error one, appellant claims that the trial court erroneously permitted the prosecution to cross-examine him at the guilt/innocence phase with specific instances of his unadjudicated misconduct for impeachment purposes. *See* TEX.R. EVID. 608(b) (generally prohibiting cross-examination of a witness with specific instances of unadjudicated conduct for impeachment purposes). The State argues, however, that the prosecution cross-examined appellant with this evidence under the theory that appellant opened the door to it with his prior testimony that "most of [his] problems were concentration type problems" related to his psychiatric disorders. *See generally Ochoa v. State*, 481 S.W.2d 847, 850 (Tex.Cr.App.1972) (party can open the door to admission of otherwise inadmissible impeachment evidence).

The record reflects that appellant did not object to this cross-examination. Appellant, therefore, presents nothing for review. *See id.; see also McDuff v. State,* 939 S.W.2d 607, 618 (Tex.Cr.App.), cert. denied, 522 U.S. 844, 118 S.Ct. 125, 139 L.Ed.2d 75 (1997) (failure to object to proffered character testimony forfeits appellate claim that it should not have been admitted). Point of error one is overruled.

In points of error two and three, appellant claims that the trial court erroneously admitted testimony at the guilt/innocence phase of appellant's involvement in the two other murders that occurred on the same day as the capital murder for which he was on trial. In point of error

two, appellant complains about the admission of Sergeant Blair's testimony that he heard appellant tell another detective that appellant did not shoot the victim's son.

> Q. [PROSECUTION]: And how does [appellant] respond when Detective Mace introduces himself?
>
> A. [BLAIR]: He – he told him he knew what was going on, that he was – it was going to be the needle or he was going to get the needle and he was just going to make it easy on everybody and kind of started – we were, you know – I didn't shoot – he said that he didn't shoot [the victim's son] –
>
> Q. Stop, stop, stop.
>
> A. Yes, sir. Sorry.
>
> Q. Let's back up.
>
> Strike that, please.

In point of error three, appellant complains about the admission of another witness' testimony that the police told her that appellant was a suspect in a triple homicide.

> Q. [PROSECUTION]: Okay. And what were you awakened by?
>
> A. [LAZRINE]: Officers at my door.
>
> Q. Okay. And who were they looking for?
>
> A. They were looking for [another person and appellant].
>
> Q. Okay. And did they tell you what or do you know what-why they were looking for them?

A. Yes. They said that they were suspects for a triple homicide.

Appellant did not object to this testimony. We need not decide whether this testimony was foreseeable because appellant also did not request an instruction to disregard or move for a mistrial. Appellant, therefore, failed to preserve any error. *See Young v. State*, 137 S.W.3d 65, 68-70 (Tex.Cr.App.2004). Points of error two and three are overruled.

In point of error four, appellant claims that the trial court erroneously denied an Article 38.23(a), Tex.Code Crim. Proc., instruction "due to disputed facts relevant to the voluntariness of the appellant's oral statement following his arrest." When there are disputed fact issues on whether evidence was legally obtained, a trial court is required to include a "properly worded" Article 38.23 instruction when requested by the defendant. *See Mendoza v. State,* 88 S.W.3d 236, 239 (Tex.Cr.App.2002); *but see Thomas v. State,* 723 S.W.2d 696, 707 (Tex.Cr.App.1986) (suggesting that trial court required to submit "properly worded" Article 38.23 instruction even when not requested by the defendant).[1]

The record reflects that the trial court denied appellant's pretrial motion to suppress his confession based on conflicting evidence. *See generally Guzman v. State,* 955 S.W.2d 85, 87-89 (Tex.Cr.App.1997). This issue was retried

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[1] Since appellant's only complaint on appeal is that the trial court refused his requested instruction, it is unnecessary in this case to resolve any conflict between our decision in *Mendoza* and our decision in *Thomas* on the issue of whether a trial court must *sua sponte* submit any other "properly worded" Article 38.23 instruction.

before the jury at the guilt/innocence phase.[2] Detective Mace testified that he initially interviewed appellant, whose arm was bandaged, in the back of an ambulance at the arrest scene. Mace testified that appellant began to make incriminating statements when he introduced himself to appellant and before he could inform appellant of his rights.

> Q. [PROSECUTION]: Let me ask you this while you are looking through your report. This statement – were the statements made by [appellant] before you asked him any questions?
>
> A. [Mace]: Yes, they were. It was actually immediately upon me introducing myself he started talking.
>
> Q. Okay.
>
> A. The first thing he stated was, "I know it's the needle and I want to save everybody the trouble and just confess."
>
> Q. Okay. Now, when that statement was made to you, did you interrupt him?
>
> A. Yes, I did. He continued speaking about this. I interrupted him and advised him of his Miranda rights.

A paramedic testified that appellant's bandaged arm was cut to the bone and that appellant had a "T-shirt, shorts and some socks on." Appellant complained that he was cold and that he was "shivering a little bit." The

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[2] *See Atkinson v. State*, 923 S.W.2d 21, 23 (Tex.Cr.App.1996) (issue of whether evidence should be excluded under Article 38.23 may also be tried to the jury).

paramedic also testified that he observed a "big knot on the back of appellant's head" which was "possibly from contact with officer during apprehension." Appellant was coherent, he did not seem intoxicated and he carried on a normal conversation with another officer (Blair) on the way to the hospital.

Blair testified that appellant did not ask for a lawyer at the arrest scene. The paramedic testified that he heard appellant tell Detective Mace in the ambulance that "I know I have a lawyer, but I am going to save us both a lot of time." Mace obtained a tape-recorded statement that was reduced to writing at the hospital. Mace provided no testimony at trial on whether appellant invoked his right to counsel at the hospital (although Mace testified at the pretrial suppression hearing that appellant did not ask for a lawyer either in the ambulance or at the hospital).

Appellant testified that the police continued to question him after he had invoked his right to counsel.

> Q. [DEFENSE]: Let me ask you if you will go back to the morning of – the early morning of [October 30th]. You remember Detective Mace giving you some warnings orally some time after 7:00 o'clock that morning?
>
> A. [APPELLANT]: In the morning? I don't recall.
>
> Q. You're not – and what I'm specifically talking about, your Miranda rights or anybody's Miranda rights, a common term. You have the right to remain silent and not make any statement and any statement might be used against you at trial. Any statement you might make can be used as evidence against you in a court of law. You have the right to have a lawyer present to

advise you during – prior to and during any questioning. If you can't afford a lawyer, you have the right to have a lawyer appointed to advise you prior to and during any questioning. And do you have – and you have the right to terminate, if you began an interview, at any time that you saw fit. Now, do you remember those warnings being given to you in the ambulance out there at Wildwood Forest?

A. I think he did. Until I – sorry. Sorry. Sorry. Sorry. I caught myself.

Q. Your answer is what?

A. Yes, he did.

[PROSECUTION]: Objection. Asked and answered. Obviously, he said he gave him the warnings.

[THE COURT]: Sustained.

Q. And then at any time thereafter, were you read or given your Miranda rights again?

A. No, sir.

Q. At any time that morning prior to Detective Mace arriving or subsequent to his arrival, did you announce to anybody that you wanted a lawyer?

A. Yes, sir.

Q. Did that request go unheeded?

A. What's unheeded?

Q. Was there any response to that request?

A. No.

Q. Did they continue talking to you?

A. Yeah. Their response was continuing talking [sic].

Q. And you give this statement to Detective Mace because you were frightened. Is that what I heard your testimony to be?

A. One of the many reasons.

Q. And what other reasons?

A. I was just shocked, tired and wanted to be left alone. I was just overwhelmed with everyone around me. I was dizzy. I just – all the talking, attacking –

Appellant also provided testimony suggesting that the police coerced him into making a false confession.

Q. [DEFENSE]: Let me restate the question. Why do you put your name on something that's not the truth?

A. [APPELLANT]: It would – I would have to start from the time of arrest, if you want me to.

Q. I want you to –

A. All right.

Q. – answer the question.

A. At the time I had had – I had previous encounters with the law like a misdemeanor drug possession or something that I missed a court date on and I knew I had a warrant for it. The night of October 24th, 2001,[3] I had been drinking heavily on quite

[3] The record reflects that appellant was arrested on October 30th and that he murdered the victim on October 24th.

– quite a few amount of pills and we ended up sleeping in a white Rodeo as a result of not being able to drive, neither – any of the occupants in the car. We didn't feel safe driving because of our influence. We pulled over and slept. Shortly after I continued to drink in the car. I must have passed out. I might have been asleep ten minutes. I couldn't tell you the exact amount of time, but a patrolman woke us up telling us to freeze, put our hands up. At the time when he pulled his – he had a gun out. He told us to freeze. I tried to attempt [sic] to get on the ground, exit the car and get on the ground. I was kind of scared and nervous at this point. [Jason] Burkett was talking about balls to the walls or some statement along that effect. He had a shotgun, so I – and from what Kristin – from what people had told me, what I had heard him say, I knew that he was capable of doing almost anything now. We ended up wrecking through a glass building. I witnessed Jason get shot. I was cut pretty badly. He kind of assisted me to some apartments. And at the time of arrest – I will jump to that – the door was not kicked in, but forced open and many officers – I couldn't tell you how many. Three or four with dogs came in the apartment. I was stood up against the wall by [Blair]. I had a gun shoved in my face. Told to the best of my recollection how would you – he [one of the victims of the triple homicide] was my friend or she was my friend or how could you do something like that. You are damn well going to tell me – tell me what happened and I was put on the ground and the knee in the back of my head and cuffed. Then put on the pavement for a pretty long amount of time. They asked to put me in the ambulance. I wasn't put in there because we were waiting for [Mace] and finally Ms. Connie [a paramedic] or

> whoever the supervisor was at the time – I now know her name to be Connie – had asked to put me in there. At the time there was quite a bit of excitement. I was under the influence. My arms hurt pretty bad and I was real scared. I was just totally – I was being a suspect. I wasn't charged yet, but I was a suspect in a triple homicide or capital murder. At the time of bringing me to the hospital, my condition in my mind state was that I am going to tell [Mace] anything he wants to hear to get him away from me, to get me out of this situation and that's what I did. I was hungry, tired and just fed up and, for one, I really didn't –

The trial court denied appellant's request for an instruction directing the jury not to consider appellant's confession if it was "due to intoxication or illness resulting from the loss of blood." Appellant's requested instruction stated:

> A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion. "Intoxication" means not having the normal use of mental faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body. Now, if you find from the evidence, or if you have a reasonable doubt thereof, that at the time the defendant gave the oral statement to [Mace], if the defendant did give it, the defendant was reduced to a condition of physical and mental impairment, due to intoxication or illness resulting from the loss of blood, such as to render such oral statement, if any, not voluntary, then you will wholly disregard the oral

> statement and not consider it for any purpose, nor any evidence obtained as a result thereof.

Appellant argues on appeal that the trial court should have submitted his requested instruction or, "if the trial court did not like that particular instruction, some other instruction covering the voluntariness issue" solely because "there was conflicting testimony as to whether [he] was intoxicated and whether he was in a distressed condition due to injuries and being cold." Assuming that there is other evidence to support a finding that appellant's intoxication and injury overbore appellant's will and caused him to confess,[4] the evidence of appellant's intoxication and injury does not raise any constitutional voluntariness issues because this evidence does not involve any police coercion or other official over-reaching. *See Colorado v. Connelly,* 479 U.S. 157, 163-166, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (integral element to support involuntariness finding is police overreaching or coercion). Point of error four is overruled.

Appellant claims in point of error five that, pursuant to the Supreme Court's decisions in *Ring v. Arizona*[5] and *Apprendi v. New Jersey*,[6] the trial court should have instructed the jury that the State was required to prove beyond a reasonable doubt that the jury should answer "no" to the mitigation special issue. Appellant claims in a

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[4] *See State v. Terrazas,* 4 S.W.3d 720, 723-24 (Tex.Cr.App.1999) (statement involuntary "only if there was official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker").

[5] 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

[6] 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

supplemental brief that our prior decisions rejecting this claim[7] have been called into question by the Supreme Court's more recent decision in *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Apprendi and *Ring* decided that the aggravating facts involved in those cases that increased the penalty beyond the prescribed statutory maximum had to be "submitted to a jury, and proved beyond a reasonable doubt." *See Ring*, 536 U.S. at 609, 122 S.Ct. 2428; *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348.[8] This Court has rejected claims that *Apprendi* and *Ring* apply to the mitigation special issue because a defendant is already eligible for a death sentence by the time the jury reaches the mitigation special issue, and, therefore, a "no" answer to the mitigation special issue would not increase this punishment. *See, e.g., Blue*, 125 S.W.3d at 501.

In *Blakely*, the Supreme Court stated that the statutory maximum sentence for *Apprendi* purposes "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict. . . .*" *See Blakely*, ___U.S. at ___, 124 S.Ct. at 2537 (emphasis in original). The Court stated:

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury*

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[7] *See, e.g., Blue v. State*, 125 S.W.3d 491, 501 (Tex.Cr.App.2003), cert. denied, ___ U.S. ___, 125 S.Ct. 297 (U.S., 2004) (No. 03-10832).

[8] These holdings are based on the Sixth Amendment right to a jury trial and "the right to have every element of the offense proved beyond a reasonable doubt." *See, e.g., Apprendi*, 530 U.S. at 477 n. 3, 120 S.Ct. 2348.

> *verdict or admitted by the defendant.* [Citations omitted]. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [citation omitted], and the judge exceeds his proper authority.[9]

Based on this passage from *Blakely*, appellant argues that, by the time the jury reached the mitigation special issue, the maximum sentence that he could have received based on the jury's partial and incomplete verdict was life (even though this partial verdict made him death-eligible).[10] Appellant further argues that, since a "no" answer to the mitigation special issue could have increased this maximum sentence from life to death, then, contrary to our decisions in cases such as *Blue,* the principles underlying *Apprendi*, *Ring* and *Blakely* are applicable to the mitigation special issue.[11] The issue is whether the

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[9] *Blakely*, ___ U.S. at ___, 124 S.Ct. at 2537 (emphasis in original).

[10] *See Tuilaepa v. California,* 512 U.S. 967, 971-75, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) (describing legally essential facts that make a defendant death-penalty eligible)

[11] Appellant argues in a supplemental brief:

> Thus, the *Blakely* decision clarifies our understanding of the rule of *Apprendi* with respect to the meaning of the statutory maximum punishment for the crime. In this context, the "maximum" is not the maximum sentence that may be imposed *after* a jury finding of additional punishment facts, but the maximum that may be imposed *without* any additional jury findings. The maximum sentence that may be imposed upon a Texas capital defendant [by the time the

(Continued on following page)

jury's finding on the mitigating evidence special issue is a "fact legally essential to the punishment." *See Blakely,* ___ U.S. at ___24 S.Ct. at 2543 (as "*Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment") (emphasis in original).

Initially, we note that the mitigation special issue is a legislative response to the Supreme Court's decision in *Penry v. Lynaugh.*[12] It is clear that *Apprendi, Ring* and *Blakely* apply only to *aggravating* facts that the prosecution must prove to support a particular sentence.[13] The holding in *Ring* expressly applies to "an aggravating circumstance necessary for imposition of the death penalty." *See Ring,* 536 U.S. at 609, 122 S.Ct. 2428.

This view is supported by footnote 16 of *Apprendi* discussing "the distinction the Court has often recognized . . . between facts in aggravation of punishment and facts in mitigation." *See Apprendi,* 530 U.S. at 490 n. 16, 120

> jury reaches the mitigation special issue] alone is life imprisonment. In order to receive death, his sentencing jury must also return a ["no"] answer to the mitigation special issue, which means that the jury has found a new ultimate fact adverse to the defendant: *his mitigation case was not sufficient to warrant a life sentence.*

(Emphasis in underline in original) (Emphasis in italics added).

[12] 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[13] *See, e.g., Ring,* 536 U.S. at 597-98 n. 4, 122 S.Ct. 2428 (noting that Ring's claim was "tightly delineated" and made no "Sixth Amendment claim with respect to mitigating circumstances") and at 612 (Scalia, J., concurring) (what "today's decisions says is that the jury must find the existence of the *fact* that an aggravating factor existed") (emphasis in original).

S.Ct. 2348.[14] This view of distinguishing between facts in aggravation of punishment and facts in mitigation finds further support in Justice Scalia's (the author of *Blakely*) concurring opinion in *Ring,* wherein he describes the imprecise Sixth Amendment claim put forth and rejected in *Walton v. Arizona*[15] (which *Ring* overruled):

> In *Walton,* to tell the truth, the Sixth Amendment claim was not put with the clarity it obtained in ... *Apprendi.* There what the appellant argued had to be found by the jury was not all facts essential to the imposition of the death penalty, but rather "*every* finding of fact underlying the sentencing decision," including not only the aggravating factors without which the penalty could not be imposed, but also the *mitigating* factors that might induce a sentencer to give a lesser punishment.[16]

Ring, 536 U.S. at 611, 122 S.Ct. 2428 (Scalia, J., concurring).

It is, therefore, clear that what a jury is asked to decide in the mitigation special issue is not a "[fact] legally

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[14] A state may, without violating due process, even require a defendant to prove facts in mitigation of punishment. *See Martin v. Ohio,* 480 U.S. 228, 230-36, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (no violation of due process for state to require a defendant to prove self-defense); *Patterson v. New York,* 432 U.S. 197, 201-02, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) (same with respect to extreme emotional disturbance). It is noteworthy that appellant's supplemental brief even refers to "his mitigation case" in the context of apparently arguing that the State has the burden to disprove "his mitigation case" beyond a reasonable doubt. *See* Footnote 11.

[15] 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *overruled by Ring*, 536 U.S. at 609, 122 S.Ct. 2428.

[16] Emphasis in original.

essential to the punishment." *See Blakely*, ___ U.S. at ___, 124 S.Ct. at 2531 (*Apprendi* holds that every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment); *Blue*, 125 S.W.3d at 501 (by the time jury reaches the mitigation special issue, the State has already demonstrated the defendant's eligibility for a death sentence). By the time the jury reaches the mitigation special issue, the prosecution has proven all aggravating "facts legally essential to the punishment." *See Blakely*, ___ U.S. at ___, 124 S.Ct. at 2531; *Tuilaepa*, 512 U.S. at 971-75, 114 S.Ct. 2630. This Court's decisions in cases such as *Blue* are consistent with *Apprendi*, *Ring* and *Blakely*. Point of error five is overruled.

In point of error six, appellant claims that the "trial court erred in failing to instruct the jury that the State has the burden of proof beyond a reasonable doubt on the mitigation issue, because the Texas statute gives the jury mixed signals as to how the mitigation issue is to be applied." The mitigation special issue does not send "mixed signals" because it permits a capital sentencing jury to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant. *See Johnson v. Texas*, 509 U.S. 350, 367-69, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993); *Cockrell v. State*, 933 S.W.2d 73, 93, (Tex.Cr.App.1996), cert. denied, 520 U.S. 1173, 117 S.Ct. 1442, 137 L.Ed.2d 548 (1997). Point of error six is overruled.

In point of error seven, appellant claims the "trial court erred by not instructing the jury that each juror had the power to prevent assessment of the death penalty by blocking a unanimous verdict for the State." This Court has rejected this claim. *See Cathey v. State*, 992 S.W.2d

460, 466 (Tex.Cr.App.1999), *cert. denied*, 528 U.S. 1082, 120 S.Ct. 805, 145 L.Ed.2d 678 (2000). Point of error seven is overruled.

In a supplemental point of error, appellant claims that it offends "the principles underlying [the United States Supreme Court's recent decision in] *Tennard v. Dretke*, [___ U.S. ___, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004)] to instruct a capital sentencing jury to disregard evidence that the jurors do not find to be sufficiently connected to the crime to reduce moral blameworthiness." This Court has decided that the mitigation special issue "does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness." *See Cantu v. State*, 939 S.W.2d 627, 648-49 (Tex.Cr.App.), *cert. denied*, 522 U.S. 994, 118 S.Ct. 557, 139 L.Ed.2d 399 (1997). The Supreme Court's *Tennard* decision, which was decided under another statutory scheme that did not include the mitigation special issue, does not hold otherwise. *See Tennard*, ___ U.S. at ___, 124 S.Ct. at 2569-72 ("impaired intellectual functioning" is inherently mitigating and, therefore, meets the definition of "constitutionally relevant" mitigating evidence). The supplemental point of error is overruled.

The judgment of the trial court is affirmed.

JOHNSON, J., concurred.

DA# 012630.1

CAUSE NO. 02-01-00320-CR

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	OF MONTGOMERY
V.	§	COUNTY, TEXAS
MICHAEL JAMES PERRY	§	221ST JUDICIAL DISTRICT

JUDGMENT ON JURY VERDICT OF GUILTY DEATH SENTENCE

(Filed Feb. 28, 2003)

Judge Presiding: Suzanne Stovall

Attorney for State: Robert Bartlett

Attorney for Defendant: Don R. Cantrell

Offense convicted of: CAPITAL MURDER

Degree: Capital
Date Offense Committed: October 24, 2001

Charging Instrument: Indictment Plea: Not Guilty

Jury Verdict: Guilty Jury Foreperson: Keith Pellerin

Plea to Enhancement Paragraph(s): N/A
Findings on Enhancement Enhancement(s): N/A

Finding on Use of Deadly Weapon: Affirmative

Punishment Assessed by: Jury

Time Credited: Since October 30, 2001 Costs: $733.00

Punishment and Place of Confinement: DEATH

Date to Commence: February 28, 2003

Total Amount of Restitution/Reparation: $0.00

Restitution to Be Paid To: Name: N/A

Concurent unless otherwise specified.

On February 18, 2003, the Court called this case for trial:

> This cause being called for trial, the State appeared by the named Assistant District Attorney, and the named Defendant, Michael James Perry, appeared in person and by counsel, and both parties announced ready for trial. The Defendant was arraigned and, in open court, pleaded not guilty to the charges against him. Thereupon, a jury composed of Keith Pellerin and eleven others was duly selected, impaneled, and sworn. The jury, having heard the indictment read, the Defendant's plea of not guilty thereto, and having heard the evidence submitted and the arguments of counsel, and having been duly charged by the Court, retired in charge of the proper officer to consider their verdict as to the guilt or innocence of the Defendant. Afterward, on February 24, 2003, the jury was brought into open court by the proper officer, the Defendant and Defendant's counsel being present, and in due form of law returned the following verdict, which was received by the Court, and is here now entered upon the minutes of the Court:
>
> "We, the Jury, find the defendant, Michael James Perry, Guilty of the offense of CAPITAL MURDER, as charged in the indictment."
>
> /s/ Keith Pellerin
> Foreperson of the Jury

Thereupon, on February 24, 2003, this cause was again called in the matter of assessing punishment.

The State appeared by its District Attorneys and the Defendant, Michael James Perry, appeared in person, his counsel also being present, and the same jury being called to assess the punishment, evidence was presented to the same jury in the matter of assessing punishment. The same jury, after hearing all the evidence presented by the State and the Defendant for the purpose of assessing punishment, and after having heard argument of counsel, again retired in charge of the proper officer to consider the verdict. Afterward, on February 28, 2003, the jury was again brought into court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

SPECIAL ISSUE NO. 1

"Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Michael James Perry, would commit criminal acts of violence that would constitute a continuing threat to society?"

Answer: YES

/s/ Keith Pellerin
Foreperson of the Jury

SPECIAL ISSUE NO. 2

"Do you find, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is

a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than death sentence be imposed."

Answer: NO

/s/ Keith Pellerin
Foreperson of the Jury

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the Defendant is guilty of the offense of CAPITAL MURDER, a capital offense, and that said Defendant committed said offense in Montgomery County, Texas on October 24, 2001, as found by the jury, and that there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society; and that, taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral culpability of the Defendant, there was not a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed; and that the law providing that on such jury finding the Court shall assess the death penalty to the Defendant.

IT IS, THEREFORE, the ORDER of the Court that the Defendant, Michael James Perry, be punished by having the death penalty assessed against him, and he is remanded to the custody of the Sheriff pending further orders herein.

Signed and Ordered on the 28 day of February 2003.

/s/ Suzanne Stovall
Judge Presiding

SENTENCE OF DEATH PRIOR TO APPEAL

On February 28, 2003, this cause was again called. The State appeared by its District Attorneys and the Defendant, Michael James Perry, was brought into open Court in person in charge of the Sheriff, his counsel also being present, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him. Thereupon the Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded in the presence of the Defendant, to pronounce sentence against the Defendant as follows:

Whereas the Defendant, Michael James Perry, has been adjudged to be guilty of CAPITAL MURDER by the jury, and the jury having further answered and that there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society; and that taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the Defendant, there was not a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed; and the law providing that on such jury finding the Court shall sentence the Defendant to death;

IT IS, THEREFORE, the ORDER of the Court that the Defendant is sentenced to death; but the law further providing for an automatic appeal to the Court of Criminal Appeals of the State of Texas, the sentence is suspended

until the decision of the Court of Criminal Appeals has been received by the Court.

The Defendant is now remanded to the custody of the Sheriff of Montgomery County, Texas, to be transported to the Institutional Division of the Texas Department of Criminal Justice at Huntsville, Texas, there to await the action of the Court of Criminal Appeals and the further orders of this Court.

Signed and Entered this the 28 day of February, 2003.

/s/ Suzanne Stovall
Judge Presiding

District Clerk of
Montgomery County, Texas
By: /s/ Judie Bench, Deputy

[RIGHT THUMB PRINT
OMITTED IN PRINTING]

VOLUME ___ PAGE ___

CAUSE NO. 02-01-00320-CR

THE STATE OF TEXAS	) (	IN THE 221ST JUDICIAL
	) (	DISTRICT COURT OF
VS.	) (	
	) (	MONTGOMERY COUNTY,
MICHAEL JAMES PERRY		TEXAS

ORDER

(Filed Apr. 3, 2003)

On this day, the Defendant's Motion for New Trial, having come on to be heard, and after hearing the argument of Counsel, the Court hereby GRANTS/DENIES said Motion in its entirety.

SIGNED this 3 day of April, 2003.

/s/ S Stovall
JUDGE PRESIDING

[SEAL]

TEXAS COURT OF CRIMINAL APPEALS
Austin, Texas

MANDATE

THE STATE OF TEXAS,

TO THE 221st JUDICIAL DISTRICT COURT OF MONTGOMERY COUNTY – GREETINGS:

Before our **COURT OF CRIMINAL APPEALS**, on the **15th** day of **DECEMBER**, A.D. 2004, the cause upon appeal to revise or reverse your Judgment between:

MICHAEL JAMES PERRY

VS.

THE STATE OF TEXAS

CCRA NO. AP-74,591

TRIAL COURT NO. 02-01-00320-CR

was determined; and therein our said **COURT OF CRIMINAL APPEALS** made its order in these words:

"This cause came on to be heard on the record of the Court below, and the same being considered, because it is the Opinion of this Court that there was no error in the judgment, it is **ORDERED, ADJUDGED AND DECREED** by the Court that the judgment be **AFFIRMED**, in accordance with the Opinion of this Court, and that this Decision be certified below for observance."

Appellant's Motion for Rehearing is DENIED.

WHEREFORE, We command you to observe the Order of our said **COURT OF CRIMINAL APPEALS** in

this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, **THE HONORABLE SHARON KELLER,**

Presiding Judge of our said **COURT OF CRIMINAL APPEALS,**

with the Seal thereof annexed, at the City of Austin,

this **9th** day of **MARCH**, A.D. 2005.

TROY C. BENNETT, JR., Clerk

/s/ [Illegible], Chief Deputy Clerk
Abel Acosta

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

(Filed Mar 14, 2005)

3/9/2005
AP-74,591
PERRY, MICHAEL JAMES
COA No. Tr. Ct. No. 02-01-00320-CR
Montgomery County, 221st District Court

I have this day, March 14, 2005, received the mandate of the Court of Criminal Appeals in the above numbered and styled case.

RETURN CARD IMMEDIATELY,

/s/ [Illegible]
Signature

Troy C. Bennett, Jr., Clerk
Court of Criminal Appeals
P.O. Box 12308, Capitol Station
Austin, Texas 78711

ATTN: ABEL ACOSTA

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

3/9/2005
RE: Case No. AP-74,591
STYLE:
PERRY, MICHAEL JAMES

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On this day, the Appellant's motion for rehearing has been denied.

Troy C. Bennett, Jr.

Danny K. Easterling
Attorney at Law
1018 Preston, Sixth Floor
Houston, TX 77002-1877

CAUSE NO. 02-01-00320-CR

THE STATE OF TEXAS	§	**IN THE DISTRICT COURT OF**
VS.	§	**MONTGOMERY COUNTY, TEXAS**
MICHAEL JAMES PERRY	§	**221ST JUDICIAL DISTRICT**

STATE'S ELECTION TO SEEK THE DEATH PENALTY

(Filed Sep. 04, 2002)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES THE STATE OF TEXAS, and hereby serves notice to the Court, the Defendant and his counsel of record of the State's Election to seek the death penalty in the above referenced and numbered cause. Specifically, the State intends to seek an affirmative finding on Special Issue One (i.e.: future threat to society) and a negative finding on Special Issue Two (i.e.: mitigating circumstance or circumstances).

WHEREFORE PREMISES CONSIDERED, the State of Texas would respectfully request that a docket sheet entry be made that it has served and provided this Court, the Defendant and his counsel of record with notice of the State's Election to Seek the Death Penalty.

Respectfully submitted,

/s/ [Illegible]

ROBERT BARTLETT
Assistant District Attorney
301 N. Thompson, Suite 106
Conroe, Texas 77301
(409) 539-7800
FAX: (409) 760-6940
SBN: 0145060

DEATH PENALTY NOTICE

CAUSE NO. 02-01-00302-CR

THE STATE OF TEXAS	§	**IN THE JUDICIAL DISTRICT**
vs.	§	**221st JUDICIAL COURT**
MICHAEL JAMES PERRY	§	**MONTGOMERY COUNTY, TEXAS**

MOTION TO HOLD UNCONSTITUTIONAL ARTICLE 37.071 SEC. 2(e) AND (f) – BURDEN OF PROOF

Motion 5B

(Filed May 8, 2002)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, MICHAEL JAMES PERRY, by and through his attorneys of record, and makes this his Motion to Hold Unconstitutional V.A.C.C.P. Article 37.071 Sec. 2(e) and (f) – Burden of Proof, and as grounds therefore would show the Court as follows:

I.

Effective September 1, 1991, a jury which has convicted a Accused Citizen of capital murder, in which the State is seeking the death penalty, shall be charged as follows:

Article 37.071, Sec. 2

(e) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:

"Whether, taking into consideration all of the evidence, including the circumstances of the offense, the Accused Citizen's character and background, and the personal moral culpability of the Accused Citizen, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed" *(emphasis added)*.

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree.

II.

This statute is unconstitutional because it demands that the defense produce "sufficient" mitigation, impermissibly shifting the burden to the Accused Citizen in violation of Article I §19 of the Texas Constitution. Further, because the statute is ambiguous as to the exact burden of proof, it provides no meaningful guidance to the juror who is called upon to make this life and death decision. As a result, the death penalty is imposed in Texas in a wanton and inconsistent manner, in violation of the Accused Citizen's rights to due process and protection from cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article Art. I § 13 of the Texas Constitution.

III.

The infirmities in the statute discussed above are also are [sic] violative of State Constitutional Law. Under the "due course of law" provision of the Texas Constitution, Article I §19, the citizens of this state are guaranteed that any punishment for an offense will be in accordance with the law. McFarlane v. State, 254 S.W.2d 136, 136 (Tex.Cr.App. 1953). When the burden of proof is impermissibly shifted to the Accused Citizen, the State's burden has essentially been reduced. See e.g., Cobarrubio v. State, 675 S.W.2d 749, 752 (Tex.Cr.App. 1983) overruled in part, Lawrence v. State, 700 S.W.2d 208, 212 (Tex.Cr.App. 1985) and Elliott v. State, 858 S.W.2d 478, 487-488 (Tex.Cr.App. 1993). Such a punishment, based on a reduced burden, is not in accordance with Texas law and is therefore unconstitutional.

WHEREFORE, PREMISES CONSIDERED, Accused Citizen prays this court will hold this statute unconstitutional, and for such other relief as Accused Citizen may be entitled.

Respectfully submitted,

By: _____

LYDIA CLAY-JACKSON
1110 N. Loop 336 W., Ste. 500
Conroe, Texas 77301
(936) 760-2889/ fax (936) 760-2892
SBN 04332450
ATTORNEY FOR ACCUSED CITIZEN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been furnished to counsel

for the State by hand-delivery, of a copy of same this the _____ day of _____, 200__.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been furnished to counsel for the State by hand-delivery, of a copy of same this the _____ day of _____, 200__.

_____
Lydia Clay-Jackson

CAUSE NO. 02-01-00320-CR

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	OF MONTGOMERY
VS.	§	COUNTY, TEXAS
	§	
MICHAEL JAMES PERRY	§	221ST JUDICIAL DISTRICT

MOTION TO DECLARE THE TEXAS CAPITAL SENTENCING SCHEME UNCONSTITUTIONAL AND MOTION TO PRECLUDE IMPOSITION OF THE DEATH PENALTY

(Filed Feb. 18, 2003)

TO THE HONORABLE JUDGE SUZANNE STOVALL:

COMES NOW, MICHAEL JAMES PERRY, Defendant, who challenges the constitutionality of the Texas death penalty on the following constitutional grounds.

I.

THE STATUTORY "PENRY" SPECIAL ISSUE IN TEX. CODE CRIM. PRO. ARTS 37.071 AND 37.0711 IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PLACE THE BURDEN OF PROOF ON THE STATE REGARDING AGGRAVATING EVIDENCE.

The Supreme Court has held that the Eighth Amendment requires the State to prove the existence of aggravating factors during the capital punishment phase. *See, e.g., Walton vs. Arizona,* 110 S.Ct. 3047, 3055 (1990) (State's "method of allocating the burdens of proof" during capital sentencing phase cannot "lessen the State's burden . . . to prove the existence of aggravating factors") in order to understand why Walton, applies to the statutory "Penry" special issue, this Court must recognize that the special

issue is a conduct for aggravating (as well as mitigating) factors. By asking jurors to determine whether there are "*sufficient*. . . . mitigating circumstances." TEX CODE CRIM. PRO. ART. 37.071, §2(e), the statutory special issue in effect tells jurors to consider any possible aggravating factors that may outweigh the mitigating factors present in the case. Although the statute does not explicitly use the term "aggravating circumstances," clearly that is how a reasonable juror would interpret the statute. *Cf. Johnson vs. Texas,* 113 S.Ct. 2568 (1993) (describing jurors determination of answer to "future dangerousness" special issue to require balancing of aggravating and mitigating circumstance). Because the statute is silent about whether the State of the defense has the burden of proof on aggravating factors, and, moreover, because the language of the special issue implies that the burden to disprove aggravating circumstance in the defense, the statute is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

II.

THE STATUTORY "PENRY" SPECIAL ISSUE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT PERMITS THE VERY TYPE OF OPEN-ENDED DISCRETION CONDEMNED BY THE UNITED STATES SUPREME COURT IN *FURMAN VS. GEORGIA.*

In *Furman vs. Georgia,* 408 U.S. 238 (1972), in which the Supreme Court struck down capital punishment as it then was being administered, the chief constitutional infirmity that the controlling Members of the Court pointed to in their respective concurring opinions was

arbitrariness. In particular, the Court condemned the ope-ended, unstructured discretion that was given to capital sentencing juries. *See also, Gregg vs. Georgia,* 428 U.S. 153 (1976); *Spazino vs. Florida,* 468 U.S. 477, 460-64 (1884).

In the new years following the Supreme Court's decision in *Penry vs. Lynaugh,* 109 S.Ct. 2934 (1989), the Texas Legislature enacted a new capital sentencing scheme that sought to cure the constitutional defect in the former capital sentencing scheme identified by the Court in *Penry.* The new statutory "*Penry*" special issue contained in TEX. CODE. CRIM. PRO. Arts. 37.071 and 37.0711 (Vernon 1994), provides as follows:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is sufficient mitigating circumstances or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Five Members of the modern Supreme Court have, directly or indirectly, condemned an open-ended, unstructured capital sentencing instruction – such as Texas statutory "*Penry*" special issue – as violative of the Eighth and Fourteenth Amendments to the United States Constitution. *See, Penry vs. Lynaugh,* 109 S.Ct. 2934, 2969 (1989) (Scalia, J., dissenting, joined by Rehnquist, C.J., White, J. and Kennedy, J.) ("In holding that the jury had to be free to deem *Penry's* mental retardation and sad childhood for whatever purpose it wished, the Court has come full circle, not only permitting but requiring what *Furman* once condemned."); *Graham vs. Collins,* 113 S.Ct. 892, 903-15

(1993) (Thomas, J., concurring) ("Penry reintroduces the very risks that we had sought to eliminate through the simple directive that States in all events provide rational standards for capital sentencing."). In dicta, Justice Thomas has explicitly suggested that the type of sentencing scheme in operation at Appellant's trial violates *Furman. See Graham,* 113 S.Ct. at 913 n. 9 (discussing the present Texas capital sentencing statute).

Rather than submit such an open-ended, unstructured sentencing issue, the Eight [sic] Amendment requires a trial court in the sentencing phase of a capital case instead submit a charge that adequately structures the jury's sentencing discretion regarding mitigating and aggravating factors. *Cf. Gergg* [sic] *vs. Georgia,* 428 U.S. 153 (1976) (discussing Georgia's post-*Furman* capital sentencing statute). Unless such an instruction is submitted in this case, a death sentence returned by Defendant's jury would violate the Eighth and Fourteenth Amendments.

III.

TEXAS' STATUTORY CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE IT DOES NOT PERMIT MEANINGFUL APPELLATE REVIEW.

As discussed above, the pivotal sentencing issue in Texas capital cases – the statutory "*Penry*" special issue – does not specify the types of mitigating or aggravating factors relevant to a capital sentencing jury's deliberations during the punishment phase. Rather, the jury is simply asked whether there are "sufficient mitigating circumstances" to warrant a life sentence rather than a death sentence. *See* TEX. CODE CRIM. PRO. Arts. 37.071 and

37.0711 (Vernon 1994). In larger sense, however, the "*Penry*" special issue requires Texas juries to perform the same functions that other states' post-*Furman* capital sentencing juries perform: (i) the threshold findings of particular aggravating and mitigating circumstances; and (ii) the balancing process, whereby jurors determine whether the mitigating factors outweigh aggravating factors. Cf. *Gregg vs. Georgia,* 428 U.S. 153 (1976) (discussing Georgia's post-*Furman* statute).

Defendant contends that Texas' unstructured sentencing scheme is unconstitutional because it does not permit meaningful appellate review, which is not only required by a Texas statute but also is a prerequisite to a constitutionally implemented capital sentencing scheme. Because the second statutory special issue is open-ended and unstructured – i.e., not enumerating a list of mitigating and aggravating factors and not requiring jurors to make specific "findings" in this regard – the Court of Criminal Appeals has no way to know which aggravating and mitigating factors that jurors considered. Thus, the appellate court has no way to know how, and indeed *whether,* the jury considered all of the constitutionally relevant mitigating evidence offered at trial. In this way, meaningful appellate review is impossible. The Supreme Court has recognized that an appellate court is in a virtually impossible position to review a jury's consideration of mitigating and aggravating evidence without knowing which factors the jury in fact considered. See, *Sawyer vs. Whitley,* 112 S.Ct. 2514, 2522-23 (1992) (noting "how difficult [a] task" a reviewing court faces in "assess[ing] how jurors" reacted to mitigating and aggravating evidence "particularly considering the breadth of those factors that a jury . . . must be

allowed to consider" without knowing how jurors actually considered the totality of the evidence).

Because the Court of Criminal Appeals is required by statute and by the Constitution to review the sufficiency of the evidence supporting a jury's negative answer to the statutory "*Penry*" special issue, the open-ended and unstructured nature of Arts. 37.071 and 37.0711, which prevents meaningful appellate review, renders the Texas capital sentencing statute unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

IV.

ARTICLE 37.071'S "PARTIES" SPECIAL ISSUE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The "parties" statutory special issue contained in TEX. CODE CRIM. PRO. Art. 37.071, §2(b) (Vernon 1994) reads as follows:

> [I]n cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another anticipated that a human life would be taken.

Defendant contends that this statutory special issue is facially unconstitutional because of the statute's use of the language "or anticipated that a human life would be taken." Defendant believes that such language – which permits a capital sentencing jury to impose a death

sentence based a finding that the defendant found guilty under the "law of the parties" simply "anticipated" that death might occur – violates the Eighth Amendments principle announced by the Supreme Court in *Tison vs. Arizona,* 481 U.S. 137 (1987) and *Edmund vs. Florida,* 458 U.S. 782 (1982).

V.

THE TEXAS CAPITAL SENTENCING STATUTE'S DEFINITION OF "MITIGATING EVIDENCE" IS UNCONSTITUTIONAL BECAUSE IT LIMITS THE EIGHTH AMENDMENT CONCEPT OF "MITIGATION" TO FACTORS THAT RENDER A CAPITAL DEFENDANT LESS MORALLY "BLAMEWORTHY" FOR COMMISSION OF THE CAPITAL MURDER.

The present Texas capital punishment statute defines "mitigating evidence" as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." TEX. CODE CRIM. PRO. Arts. 37.071, §2(e) (4) and 37.0711, §3(f)(3) (Vernon 1994). This definition of "mitigating evidence" is unconstitutionally narrow. The Supreme Court has held that constitutionally relevant mitigating evidence is not simply that type of mitigating evidence that relates to a capital defendant's moral culpability or blameworthiness for the crime, but also includes any mitigating evidence relevant to a defendant's character, history, or circumstances if the crime that militates in favor of a life sentence. *See, e.g., Skipper vs. South Carolina,* 476 U.S. 1 (1986). Numerous types of constitutionally relevant mitigating evidence thus have nothing to do with a capital defendant's moral culpability or blameworthiness – such as a history of positive character traits, kindness shown toward children, or artistic talent. Although the

statutory "*Penry*" special issue speaks of "the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant," Art. 37.071, §2(e), the statute's separate definition of "mitigating evidence" limits jurors' consideration of such evidence to those mitigating factors that specifically implicate the defendant's moral blameworthiness.

Therefore, the statute's limited definition of "mitigating evidence" violates the Eighth and Fourteenth Amendments to the United States Constitution.

VI.

THIS COURT MUST PRECLUDE THE IMPOSITION OF THE DEATH PENALTY ON DEFENDANT BECAUSE, AT LEAST A [sic] PRESENTLY ADMINISTERED IN TEXAS, CAPITAL PUNISHMENT IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §13 OF THE TEXAS CONSTITUTION.

A. *Federal constitutional claim.*

Rather than enrage [sic] in a lengthy exposition about why capital punishment is per se unconstitutional – at least as it is presently administered – Defendant herein adopts the cogent arguments of Justice Harry Blackmun, which were recently made in his dissent from denial of certiorari in the Texas capital case of *Callins vs. Collins,* No. 93.7054, ___ U.S. ___, 62 U.S.L.W. 3546 (U.S. Feb 22, 1994). Justice Blackmun, who dissented in Furman and who voted in the majority in the 1976 cases affirming various states' post-*Furman* death penalty statutes, *see,*

e.g., Jurek vs. Texas, 428 U.S. 262 (1976), did not condemn capital punishment in the abstract as a cruel and unusual method of punishment that offends "evolving standard of decency." Cf. *Gregg vs. Georgia,* 428 U.S. 153. 227-41 (1976) (Brennan and Marshall, JJ., dissenting). Rather, Justice Blackmun contended, *inter alia,* that capital sentencing procedures employed in the post-*Furman* era are per se unconstitutional because they are the product of paradoxical constitutional commands; on the one hand, jurors must be free to consider any and all types of constitutionally relevant mitigating evidence, while, on the other hand must be "structured discretion" in sentencing, as required by *Furman. See Callins,* supra, slip op., at 2 ("Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death . . . can never be achieved without compromising an equally essential component of fundamental fairness – individualized sentencing.").

Thus, at least regarding the death penalty as it is presently being administered in Texas, it is per se unconstitutional under the Eighth and Fourteenth Amendments. In particular, the present Texas capital sentencing scheme – including the statutory "*Penry*" special issue – is unconstitutional because it permits the very type of open-ended discretion condemned by the Supreme Court in *Furman.* Accordingly, this Court should preclude the State from seeking the death penalty against Defendant, at least so long as the present capital sentencing scheme remains in effect.

B. *Texas constitutional claim.*

Although Defendant has cited federal Eighth Amendment authority supra, he intends that this Court should

separately consider his claim under the Texas and United States Constitutions. As this Court has noted, it can and should interpret the Texas Constitution in more expansive manner than the federal Constitution. *See e.g., Parish vs. State,* 869 S.W.2d 352 (Tex. Cr. App. 1194); *Heitman vs. State,* 815 S.W.2d 681 (Tex. Cr. App. 1991); *see also Ex Parte Herrera,* 860 S.W.2d 106 (Tex. Cr. App. 1993) (Maloney, J., Dissenting, joined by Baird, Clinton and Overstreet, JJ.); Judge Rusty Duncan, *Terminating the Guardianship; A New Role for State Court,* 19 ST. MARY'S L.J. 809(1988).

VII.

ART. 37.071'S "12-12 RULE," WHICH REQUIRES AT LEAST TEN "NO" VOTES FOR THE JURY TO RETURN A NEGATIVE ANSWER TO THE FIRST OR SECOND SPECIAL ISSUES AND AT LEAST TEN "YES" VOTES FOR THE JURY TO RETURN AN AFFIRMATIVE ANSWER TO THE THIRD SPECIAL ISSUE, VIOLATES THE EIGHTH AMENDMENT PRINCIPLE IN *MILLS VS. MARYLAND.*

Defendant contends that the "10-12 provision" in Art. 37.071, §2(d)(2) and §2(f)(2), violates the constitutional principles discussed in *Mills vs. Maryland,* 486 U.S. 367 (1988); *see also McCoy vs. North Carolina,* 494 U.S. 294 (1990). The "10-12 provision" requires that in order for the jury to return answers to the special issues that would result in a life sentence, (i) at least ten jurors must vote "no" in answering the first special issue, (ii) at least ten jurors must vote "no" in answering the second special issue, or (iii) at least ten jurors must vote "yes" in answering the third special issue. Defendant contends that this "10-12 provision" violates the Eighth and Fourteenth

Amendments because there is a reasonable possibility that, under the present Texas capital sentencing scheme, all twelve jurors in a capital case could believe that a life sentence would be appropriate under state law, but because at least ten jurors could not collectively agree on their answer to any one of the special issues, the jury could not return a life sentence.

As an illustration, consider the following hypothetical circumstance: at trial, four of the twelve jurors conclude that, as a consequence of a capital defendant's positive character traits, he would not pose a future threat to society; thus, those jurors individually vote to answer the first special issue negatively. Assume that those four jurors also believe, however, that the defendant possessed the requisite *mens rea* under the second special issue (the "parties" special issue) and that there is insufficient mitigating evidence as a whole to result in an affirmative answer to the third special issue (the "Penry" special issue).

Further suppose that the four other jurors believe that the same capital defendant did not possess the requisite *mens rea* under the second special issue negatively. Assume, however, that those four jurors believe that the capital defendant does not pose a future danger to society and that those four jurors also believe that the defendant's mitigating evidence, as a whole, is insufficient to result in a "no" vote to the statutory "Penry" special issue.

Finally, suppose that the four remaining members of the jury conclude, as a result of the capital defendant's mitigating evidence of a troubled childhood, that the statutory *Penry* special issue should be answered affirmatively. However, for

whatever reason, assume that those four jurors also believe that the capital defendant would pose a future threat to society and also that the defendant possessed the requisite *mens rea* under the "parties" special issue. Thus, those four remaining jurors only vote in the defendant's favor on the third special issue.

Such a breakdown can be graphically illustrated:

	1st Special Issue	2nd Special Issue	3rd Special Issue
Juror 1:	No (life)	Yes (death)	No (death)
Juror 2:	No (life)	Yes (death)	No (death)
Juror 3:	No (life)	Yes (death)	No (death)
Juror 4:	No (life)	Yes (death)	No (death)
Juror 5:	Yes (death)	No (life)	No (death)
Juror 6:	Yes (death)	No (life)	No (death)
Juror 7:	Yes (death)	No (life)	No (death)
Juror 8:	Yes (death)	No (life)	No (death)
Juror 9:	Yes (death)	Yes (death)	Yes (life)
Juror 10:	Yes (death)	Yes (death)	Yes (life)
Juror 11:	Yes (death)	Yes(death)	Yes (life)
Juror 12:	Yes (death)	Yes (death)	Yes (life)

Hypothetically speaking all twelve members of the jury in such case individually agree that *one of the three statutory mitigating factors* has been established and that, under state law, a life sentence is appropriate. That is, all twelve jurors could have believed that a mitigating factor exists which, under state law, should have caused the capital defendant to be sentenced to life. However, Texas law forbids the imposition of a death sentence *only* if ten members of a capital sentencing jury agree collectively as to which statutory mitigating factor has been established; because such jurors could disagree about which of the three factors has been established, however, they are left

without guidance as to how to proceed. In the absence of such guidance, there is, constitutionally unacceptable risk that Texas capital sentencing juries may feel coerced by a "majority rules" mentality into returning answers to the special issues that would result in a death sentence. A death sentence imposed by a jury so instructed is too likely a product of arbitrary decision-making for the Constitution to tolerate. *See McCoy vs. Maryland, supra; Mills vs. Maryland, supra.*

VIII.

THE TEXAS CAPITAL SENTENCING STATUTE'S FAILURE TO INFORM THE JURY THAT A SINGLE HOLDOUT JUROR ON ANY SPECIAL ISSUE WOULD RESULT IN AN AUTOMATIC LIFE SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Texas capital sentencing statutes provide that a deadlocked jury – even based on a single holdout juror – during the capital sentencing phase requires that the trial court automatically sentence the defendant to death. *See* TEX. CODE CRIM. PRO. Arts. 37.071, §2(g) and 37.0711, §3(g) (Vernon 1994). However, the jury cannot be informed of this provision of the law. *See* Arts. 37.071, §2(a) and 37.0711, § 3(i). Such a denial of this aspect of the law violates the Eighth and Fourteenth Amendments to the United States Constitution. *See State vs. Ramseur,* 524 A.2d 188, 284 (N.J. 1987). *Kubat vs. Thieret,* 867 F.2d. 351, 369-73 (7th Cir.), *cert. denied,* 493 U.S. 874 (1989); *see also Andres vs. United States,* 333 U.S. 740, 752 (1948) (federal capital case).

CONCLUSION

For the forgoing reasons, this Court should declare the Texas capital sentencing scheme unconstitutional and further preclude the imposition of the death penalty in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing motion has been delivered to Robert Bartlett via facsimile transmission to 936-760-6940 on this the 17th day of February, 2003.

/s/ Don R. Cantrell
DON R. CANTRELL

CAUSE NO. 02-01-00320-CR

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	OF MONTGOMERY
VS.	§	COUNTY, TEXAS
	§	
MICHAEL JAMES PERRY	§	221ST JUDICIAL DISTRICT

ORDER

(Filed Feb. 18, 2003)

On this the ___ day of ___, 2003, came on to be heard the Defendant's Motion to Declare the Texas Capital Sentencing Scheme Unconstitutional and Motion to Preclude Imposition of the Death Penalty, and after due consideration, the Court is of the opinion, and it is hereby ORDERED, that said request is:

_____ GRANTED

__✓__ DENIED

SIGNED on this the 19 day of February, 2003.

/s/ Suzanne Stovall
JUDGE SUZANNE STOVALL

CAUSE NO. 02-01-00320-CR

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
vs.	§	OF MONTGOMERY COUNTY, TEXAS
MICHAEL JAMES PERRY	§	221st JUDICIAL DISTRICT

CHARGE TO THE JURY

LADIES AND GENTLEMEN OF THE JURY:

You have found the defendant, MICHAEL JAMES PERRY, guilty of the offense of capital murder, which was alleged to have been committed on or about October 24, 2001. It is now your duty to determine, from all the evidence in this case, the answers to questions called "Special Issues."

I.

You are instructed that the punishment for capital murder is either death or confinement in the Institutional Division of the Texas Department of Criminal Justice for life.

II.

You are instructed to answer Special Issue One either "Yes" or "No" in accordance with the instructions given in this charge. Special Issue Two should be answered only if you have answered "Yes" to Special Issue One.

III.

In deliberating on your answer to Special Issue One, you are instructed that:

(1) The State must prove beyond a reasonable doubt that Special Issue One should be answered "Yes";

(2) You shall consider all the evidence admitted at the guilt or innocence stage and punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition the death penalty;

(3) Special Issue One may not be answered "Yes" unless the jury agrees unanimously, and Special Issue One may not be answered "No" unless ten or more members of the jury agree; and

(4) The members of the jury need not agree on what particular evidence supports a "No" answer to Special Issue One.

If you do not find and believe from the evidence beyond a reasonable doubt that the answer to Special Issue One should be "Yes," or if you have a reasonable doubt thereof, then you shall answer Special Issue One "No."

If you have answered Special Issue One "No," then you shall cease your deliberations and report your verdict to the Court. If you have found beyond a reasonable doubt that the answer to Special Issue One is "Yes," then you shall next consider Special Issue Two.

IV.

You are instructed to answer Special Issue Two "Yes" or "No." In deliberating on your answer to Special Issue Two, you are instructed that:

(1) Special Issue Two may not be answered "No" unless the jury agrees unanimously, and Special Issue Two may not be answered "Yes" unless ten or more members of the jury agree;

(2) The members of the jury need not agree on what particular evidence supports a "Yes" answer to Special Issue Two; and

(3) In arriving at your answer, you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

You are further instructed that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment rather than a death sentence be imposed, the Court will sentence the defendant to imprisonment in the Institutional Division of the Texas Department of Criminal Justice for life.

V

Under the law applicable in this case, if the defendant is sentenced to imprisonment in the Institutional Division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals forty years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is

sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted.

VI.

You are further instructed that our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a right accorded to a defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him. In this case, the defendant has elected not to testify, and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the defendant.

VII.

You have been permitted to take notes during the testimony in this case. If you took notes, you may use your notes to stimulate your memory during the deliberations of the jury, but you should not share the contents of your notes. You may not use your notes as authority to persuade your fellow jurors because your notes are not the official transcript in the case. Do not give more weight or less weight to the views of a fellow juror on the basis of whether that juror took or did not take notes.

Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of disputed testimony to you from the official transcript. You shall not rely on your

notes to resolve the dispute because those notes, if any, are not official transcripts. The dispute must be settled by the official transcript, for it is the official transcript, rather than any juror's notes, upon which you must base your determination of the facts and, ultimately, your verdict in this case.

At the end of your deliberations, please give any notes you have made to your foreperson. The foreperson should hand in your notes with the verdict. Your notes will be destroyed immediately after the trial and no one will look at them.

VIII.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and the weight to be given their testimony, but you must follow the law given to you in these written instructions.

During your deliberations on these Special Issues, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

In determining the answers to the Special Issues, it will not be proper for you to fix the same by lot, chance, or any other method than by a full, fair, and free exchange of the opinion of each individual juror.

No one has any authority to communicate with you except the bailiff. After you have retired, you may communicate with this Court in writing through the bailiff. Any communication relative to the cause must be written,

prepared, and signed by the foreperson and shall be submitted to the Court through the bailiff. Do not attempt to talk to the bailiff, the attorneys, the Court, or anyone else concerning any questions you may have.

Your sole duty at this time is to determine the answers to the Special Issues that follow. Restrict your deliberations solely to the Special Issues.

/s/ Suzanne Stovall
Judge Presiding

SPECIAL ISSUE ONE:

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, MICHAEL JAMES PERRY, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER: We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Issue One is "Yes."

/s/ [Illegible]
Foreperson

OR

ANSWER: We, the jury, because at least ten jurors have a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, determine that the answer to Special Issue One is "No."

_____
Foreperson

SPECIAL ISSUE TWO:
(To be answered only if the answer to Special Issue One is "Yes")

Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, is there a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

ANSWER: We, the jury, unanimously find and determine that the answer to this Special Issue Two is "No."

/s/ [Illegible]
Foreperson

OR

ANSWER: We, the jury, because at least ten jurors believe there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed, answer Special Issue Two "Yes."

_____
Foreperson

Supreme Court, U.S.
AUG 3 - 2005
OFFICE OF THE CLERK

(3)

No. 04-1660

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL JAMES PERRY,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

I. **Whether this Court's decisions in *Ring*, *Apprendi*, and *Blakely*, requiring that any fact increasing the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt, also applies to the jury's determination of the mitigation special issue that might *reduce* a defendant's sentence?**

II. **Whether the jury instruction submitted with the Texas mitigation special issue, advising the jury to consider mitigating evidence to be that which a juror might regard as reducing the defendant's "moral blameworthiness," is unconstitutional because the jury could effectively believe it was instructed to disregard evidence unrelated to moral blameworthiness?**

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

I. Course of Proceedings and Disposition Below 1

II. Facts of the Crime 1

ARGUMENT 2

I. The Questions Presented for Review Are Unworthy of the Court's Attention. 2

II. Certiorari Should Be Denied Because *Ring v. Arizona*, 536 U.S. 584 (2002), Is Inapplicable to a Capital Sentencing Jury's Finding on the Mitigation Special Issue. 3

III. Certiorari Review Should Be Denied Because the "Moral Blameworthiness" Definition of "Mitigating Evidence" Does Not Unconstitutionally Limit the Jury's Consideration of Evidence. 13

CONCLUSION 17

TABLE OF AUTHORITIES

Cases **Page**

Apprendi v. New Jersey, 530 U.S. 466 (2000) . . . . . *passim*

Blakely v. Washington, 542 U.S. 296 (2004) . . . . . *passim*

Boyde v. California, 494 U.S. 370 (1990) 14,15

Buchanan v. Angelone, 522 U.S. 269 (1998) 12,15

Caldwell v. Mississippi, 472 U.S. 320 (1985) 12

California v. Brown, 479 U.S. 538 (1987) 16

Cantu v. State, 939 S.W.2d 627 (Tex. Crim. App. 1997) . . . 14

Cardinale v. Louisiana, 394 U.S. 437 (1969) 11

Clemons v. Mississippi, 494 U.S. 738 (1990) 10

Eddings v. Oklahoma, 455 U.S. 104 (1982) 7,14

Franklin v. Lynaugh, 487 U.S. 164 (1988) 16

Graham v. Collins, 506 U.S. 461 (1993) 14,15,16

Heath v. Alabama, 474 U.S. 84 (1985) 11

Hill v. California, 401 U.S. 797 (1971) 11

Hughes v. State, 897 S.W.2d 285 (Tex. Crim. App. 1994) . . 11

Illinois v. Gates, 462 U.S. 213 (1983) 11

TABLE OF AUTHORITIES, Continued

Cases **Page**

Jackson v. Virginia, 443 U.S. 307 (1979) 11

Johnson v. Texas, 509 U.S. 350 (1993) 14,15

Jurek v. Texas, 428 U.S. 262 (1976) 11,12

Leland v. Oregon, 343 U.S. 790 (1952) 9

Lewis v. Jeffers, 497 U.S. 764 (1990) 11,12

Livingston v. State, 739 S.W.2d 311 (Tex. Crim. App. 1987) 11

Lockett v. Ohio, 438 U.S. 586 (1978) 14

Lowenfield v. Phelps, 484 U.S. 231 (1988) 11

Martin v. Ohio, 480 U.S. 228 (1987) 9

McCleskey v. Kemp, 481 U.S. 279 (1987) 12

Patterson v. New York, 432 U.S. 197 (1977) 9

Payne v. Tennessee, 501 U.S. 808 (1991) 14

Penry v. Johnson, 532 U.S. 782 (2001) ..... *passim*

Penry v. Lynaugh, 492 U.S. 302 (1989) ..... *passim*

Pulley v. Harris, 465 U.S. 37 (1984) 11,12

Ring v. Arizona, 536 U.S. 584 (2002) ..... *passim*

TABLE OF AUTHORITIES, Continued

Cases **Page**

Rivera v. Delaware, 429 U.S. 877 (1976) 9

Saffle v. Parks, 494 U.S. 484 (1989) 15,17

Skipper v. South Carolina, 476 U.S. 1 (1986) 16

Stringer v. Black, 503 U.S. 222 (1992) 11

Tacon v. Arizona, 410 U.S. 797 (1971) 11

Tennard v. Dretke, 124 S. Ct. 2562 (2004) 14,15

Texas v. Cobb, 532 U.S. 161 (2001) 10

Tuilaepa v. California, 512 U.S. 967 (1994) ..... *passim*

Walton v. Arizona, 497 U.S. 639 (1990) 8,9

Woodson v. North Carolina, 428 U.S. 280 (1976) 7

Zant v. Stephens, 461 U.S. 862 (1983) 7

Constitutions, Statutes and Rules

U. S. Const., amend. VI ..... *passim*

U. S. Const., amend. VIII ..... *passim*

U. S. Const., amend. XIV 3,6

TEX. CODE CRIM. PROC. art. 37.071 § 2(b) and (e) 6,7

TABLE OF AUTHORITIES, Continued

Constitutions, Statutes and Rules **Page**

TEX. CODE CRIM. PROC. art. 37.071 § 2 (e) & (f) 8,13,14

SUP. CT. R. 10 2

MISCELLANEOUS

N.J. Stat. Ann. § 2C:44-3(e) (West 2000) 4

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Perry was properly convicted and sentenced to death for the brutal capital murder of Sandra Stotler, committed while in the course of committing the burglary of Stotler's home. Perry now petitions this Court for a writ of certiorari, complaining that the Texas Court of Criminal Appeals erred when it determined that the Texas capital sentencing scheme was constitutionally sound. However, Perry is unable to present any special or important reason for certiorari review because he fails to demonstrate a violation of any federal constitutional right. Certiorari review should therefore be denied.

STATEMENT OF THE CASE

I. Course Of Proceedings And Disposition Below

Perry was convicted and sentenced to death in February, 2003, by a jury in the 221st District Court of Montgomery County, Texas. 4 CR 597, 604-5.[1] The Texas Court of Criminal Appeals affirmed Perry's conviction and sentence on direct appeal on December 15, 2004. *Perry v. State*, 158 S.W.3d 438, 439 (Tex. Crim. App. 2004). Perry's motion for rehearing was denied on March 9, 2005. Perry filed the instant petition on June 7, 2005.

II. Facts of the Crime

The Texas Court of Criminal Appeals' opinion on direct appeal succinctly summarized the evidence of Perry's guilt:

> The evidence shows that [Perry] murdered the victim by shooting her with a shotgun while [Perry] and another person were burglarizing her home. Later that night [Perry] was involved in the

---

[1] "CR" refers to the Clerk's Record of pleadings and documents filed with the clerk during trial.

> murder of this victim's son and another person. [Perry] was arrested about a week later in an apartment where he had fled following a high-speed car-chase with the police during which [Perry] injured his arm, and one of the other occupants in the car was shot by the police in an exchange of gunfire. The injury to [Perry's] arm was serious enough to require treatment at a hospital. The police obtained a written confession from [Perry] at the hospital.
>
> [Perry] was charged and tried only for the murder of the mother during the burglary of her home. [Perry] testified at the guilt/innocence phase that he was not involved in this murder and that his confession was not true.

Perry, 158 S.W.3d at 439.

ARGUMENT

I. The Questions Presented for Review Are Unworthy of the Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons to do so. Perry advances no compelling reason in this case, and none exists. The Texas Court of Criminal Appeals properly affirmed Perry's conviction and sentence. The issues Perry now raises do not present viable claims for review. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction

II. Certiorari Should Be Denied Because *Ring v. Arizona*, 536 U.S. 584 (2002), Is Inapplicable to a Capital Sentencing Jury's Finding on the Mitigation Special Issue.

Perry argues that the Texas capital sentencing scheme violates the Sixth, Eighth and Fourteenth Amendments because it does not require a "reasonable doubt" standard for the mitigation special issue, as required under *Ring v. Arizona*, 536 U.S. 584 (2002).

The Texas Court of Criminal Appeals rejected this claim, holding that the reasonable doubt instruction was not required because a Texas defendant is already eligible for the death sentence by the time the jury reaches the mitigation special issue, and a negative answer to this issue would not increase the punishment. *Perry*, 158 S.W.3d at 446-47. The court noted that *Ring, supra, Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), apply only to aggravating facts that the prosecution must prove to support the sentence, whereas the mitigation special issue is not a fact legally essential to punishment which must be proven by the State beyond a reasonable doubt. *Perry*, 158 S.W.3d at 448.

The state court correctly rejected this claim as the *Ring*, *Apprendi*, and *Blakely* decisions do not compel the relief Perry seeks. The Sixth and Fourteenth Amendment considerations of these decisions do not apply to jury determinations of *mitigating* factors that might *reduce* a defendant's sentence. Therefore, certiorari review of this claim is unnecessary and should be denied.

Ring is a result of this Court's *Apprendi* decision, in which the Court reversed a New Jersey non-capital conviction because the trial court unconstitutionally increased the defendant's sentence beyond the statutory maximum based on a separate, but unindicted, hate crime statute. 530 U.S. at 470-71. The underlying indicted firearms offense carried a maximum penalty

of ten years incarceration, but the unindicted hate crime offense was punishable by "an extended term of imprisonment if the trial judge [found], by a preponderance of the evidence, that the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race ...." *Id.* at 468-69 (internal quotations omitted) (citing N.J. Stat. Ann. § 2C:44-3(e) (West 2000)). The hate crime statute authorized an extended term of between ten and twenty years, and the defendant was sentenced to twelve years. *Id.* at 469, 471.

This Court reasoned that the New Jersey provision violated "basic principles" requiring trial to a jury of "all facts necessary to constitute a statutory offense, and proving those facts beyond a reasonable doubt." *Apprendi*, 530 U.S. at 483-84. Essentially, the firearms statute and the hate crime statute constituted two separate offenses with distinct elements and punishments. *Id.* at 476. Thus, historic notions of due process and fair notice demanded that *Apprendi* be apprized of all elements of each offense so that he could prepare his defense accordingly and understand which penalty might result. *Id.* at 478. New Jersey's transparent attempt to sidestep these requirements and label the hate crime offense as a "sentencing factor" was unconstitutional because it removed from the jury consideration of Apprendi's state of mind or "purpose" – a substantive element of a distinct crime – and lessened the burden of proof on that element. *Id.* at 490-93. This effectively transformed a jury conviction of a second-degree offense to the equivalent of a first-degree punishment without jury consideration of the additional factual element. *Id.* at 491. The Court rejected this scheme and held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

In *Ring*, the Court applied *Apprendi*, "which held that the Sixth Amendment does not permit a defendant to be 'expose[d] ... to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone,'" to strike

down Arizona's capital sentencing scheme which allowed the trial judge, rather than the jury, to find the aggravating circumstance necessary to impose the death penalty. *Ring*, 536 U.S. at 588-89, 609 (quoting *Apprendi*, 530 U.S. at 483) (emphasis in *Ring*). Ring was convicted by a jury of the lesser-included offense of felony murder because the evidence tied him only to the proceeds of an armored car robbery, but not the murder of the driver itself. *Id.* at 591-92. "Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made" by a judge alone. *Id.* at 592. During the sentencing proceeding, new evidence led the court to conclude that Ring murdered the armored car driver, and the court sentenced him to death. *Id.* at 594-95.

The Court noted that, "[b]ased solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment." *Ring*, 536 U.S. at 597. Where an increase in punishment is contingent on an additional finding of fact – in *Ring*, the additional finding was a more culpable mental state – the Constitution requires that the fact must be found by a jury beyond a reasonable doubt. *Id.* at 600-01. Thus, Arizona's sentencing scheme was unconstitutional "to the extent that it allows a sentencing *judge*, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609 (emphasis added). In other words, Ring's state of mind was a death eligibility requirement not submitted to a jury and proved beyond a reasonable doubt.

Blakely did not break any new ground nor extend *Apprendi* or *Ring*. In *Blakely*, this Court found that the petitioner's sentence violated the Sixth Amendment because he was sentenced to more than three years above the allowed statutory maximum range based upon the judge's finding – which relied on facts neither admitted by the petitioner nor found by a jury – that the petitioner had acted with "deliberate cruelty." 124 S. Ct. at 2537. This Court reiterated that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the*

facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 124 S. Ct. at 2537 (emphasis in original). This Court said the same thing in *Ring*. 536 U.S. at 586 (the Sixth Amendment does not permit a defendant to be "exposed ... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone").

However, *Apprendi*, *Ring*, and *Blakely* are of absolutely no moment here because the Texas special issues do not "increase[] the penalty for [capital murder] beyond the prescribed statutory maximum" in violation of the United States Constitution. *Apprendi*, 530 U.S. at 490. In this case, the elements of capital murder were indicted, submitted to the jury, and proven beyond a reasonable doubt as a prerequisite to reaching the punishment phase of Perry's trial. *See* 1 CR 12; 4 CR 589-97. And, once Perry's trial proceeded to the punishment phase, the special issues were submitted to the *jury* according to Texas law. TEX. CODE CRIM. PROC. art. 37.071 § 2(b) and (e); *see* 4 CR 599-65. Thus, Texas law did not improperly attempt to bypass the Sixth and Fourteenth Amendment rationale of *Apprendi/Ring/Blakely* in determining Perry's guilt and his "death eligibility."

Furthermore, to the extent that the Texas future dangerousness special issue is considered an "aggravating" factor, the Texas scheme completely satisfies the Sixth Amendment because, at the conclusion of the punishment phase of a capital trial, the jury is instructed to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," and the State is required to prove the issue beyond a reasonable doubt. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(1) and (c). In the instant case, the jury was instructed in compliance with the statute and nothing else was required. *See* 4 CR 604.

The mitigation special issue likewise does not violate the Constitution because, although a Texas capital sentencing jury must specifically answer the mitigation special issue in the

negative to render a death sentence, *see* Petition at 21, the actual function of that special issue is plainly meant to inure to the defendant's benefit by allowing the jury an avenue to give effect to mitigating evidence. Thus, the Texas mitigation issue does not operate as the "functional equivalent of an element of a greater offense." *Ring*, 536 U.S. at 609; *Apprendi*, 530 U.S. at 494.

The capital punishment jurisprudence has traditionally recognized the distinction between aggravating factors and mitigating circumstances. In *Tuilaepa v. California*, this Court explained that there are "two different aspects of the capital decision making process: the eligibility decision and the selection decision." 512 U.S. 967, 971 (1994). To determine that an individual is eligible for the death penalty the jury must convict the defendant of murder and find one "aggravating circumstance" at either the guilt or punishment phase of trial. *Id.* at 972. "The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)," and may not be a factor applicable to every defendant convicted of murder. *Id.* The selection decision, however, serves an entirely different function. Here, the jury decides whether a defendant who is eligible for the death penalty should, in fact, receive that sentence. *Tuilaepa*, 512 U.S. at 972. "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstance of the crime." *Id*, citing *Zant v. Stephens*, 461 U.S. 862, 879 (1983) (emphasis original).

Under Texas law, the mitigation special issue is not an element of the offense of capital murder nor is it an aggravating circumstance as defined by *Tuilaepa*. Rather it is the vehicle through which the jury is given the opportunity to make an individualized determination of the offender's moral culpability, as required by this Court. *See Penry v. Johnson*, 532 U.S. 782, 797 (2001); *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). In making the decision, the jury is instructed to consider all the

evidence, including the circumstances of the offense, the defendant's character and background, and general moral culpability of the defendant. TEX. CODE CRIM. PROC. art. 37.071 § 2 (e) & (f). The jury is not required to agree on what evidence supports an affirmative answer. TEX. CODE CRIM. PROC. art. 37.071 § 2 (e) & (f). Clearly, the mitigation issue confers upon the jury a broad ability to show leniency and *reduce* the defendant's sentence to life imprisonment. Thus, it is untenable that this special issue is equivalent to an aggravating factor which must be decided beyond a reasonable doubt.

Moreover, this distinction between aggravating factors and mitigating circumstances is expressly acknowledged in both the *Apprendi* and *Ring* decisions. In *Ring*, this Court emphasized that the defendant's claim was "tightly delineated" to the issue of whether the Sixth Amendment requires a jury finding on the aggravating circumstances asserted against him, and made no assertions with respect to mitigating circumstances. *Ring*, 536 U.S. at 597 n. 4. The Court's ultimate conclusion was limited accordingly. *Id.* at 609 (holding that *Walton v. Arizona*, 497 U.S. 639 (1990), was overruled to the extent that it "allows a sentencing judge, sitting without a jury, to find an *aggravating* circumstance necessary for the imposition of the death penalty," and that "[b]ecause Arizona's enumerated *aggravating factors* operate as the functional equivalent of an element of a greater offense, the Sixth Amendment required that they be found by a jury")(internal citations and quotations omitted).

Likewise, the *Apprendi* decision explicitly noted and reaffirmed the distinction between "facts in aggravation of punishment and facts in mitigation." *Apprendi*, 530 U.S. at 490 n. 16. There, the Court noted that where a judge finds a fact which allows a defendant to "escape the statutory maximum" attached to a jury verdict, that finding by a judge "neither expos[es] the defendant to a deprivation of liberty greater than that authorized by the verdict according to the statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the verdict

alone." *Id.* Similarly, in a concurring opinion joined by Justice Scalia, Justice Thomas pointed out that facts with the potential to mitigate punishment are not an element of a crime that might increase a sentencing decision. *Id.* at 501(Thomas, J. concurring, joined by Scalia, J.) Clearly, neither the *Ring* nor *Apprendi* holding contemplates extending the Sixth Amendment's "reasonable doubt requirement" to a capital jury's finding regarding mitigating evidence.

Equally important here is the portion of *Walton* left untouched by the majority in *Ring*, wherein the Supreme Court stated that the Eighth Amendment did not bar a state from imposing a burden of proof *on the defendant* to "establish, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency." *Walton*, 497 U.S. at 649-51. The Court noted that nothing in its Eighth Amendment jurisprudence precluded the state from "specifying how mitigating circumstances are to be proved." *Id.* at 649. Indeed, it noted that in several other capital cases, it found it constitutional for a state to impose a burden of proof on the defendant to prove issues such as self-defense, insanity, and "the affirmative defense of extreme emotional disturbance." *Id.* at 650; *see Martin v. Ohio,* 480 U.S. 228 (1987); *Patterson v. New York,* 432 U.S. 197 (1977); *Rivera v. Delaware,* 429 U.S. 877 (1976); *Leland v. Oregon,* 343 U.S. 790 (1952). The Court gleaned from these cases the following rule:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden to prove mitigating circumstances sufficiently substantial to call for leniency.

Walton, 497 U.S. at 650.

The practical implications of Perry's argument preclude the adoption of his reading of *Ring*. Prosecutors would be in the absurd position of proving a negative beyond a reasonable doubt. This is impossible under the Texas system in which jurors are left to decide what evidence is mitigating and whether that evidence suggests that mercy is appropriate, and where individual jurors need not agree on what evidence is mitigating when voting on this issue. Thus, not only would accepting Perry's assertion improperly extend *Apprendi* and *Ring* without basis and pervert much of this Court's Eighth Amendment jurisprudence, it would also be highly impractical.

Finally, it is important to note that the judge-versus-jury problem recognized in the *Ring/Apprendi/Blakely* cases is inapposite to the Texas capital sentencing scheme because the trial judge has no fact-finding role in a capital murder case under Texas law. Indeed, these cases do not address the Texas special issues nor the constitutionality of the Texas capital sentencing scheme. "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *See Texas v. Cobb*, 532 U.S. 162, 169 (2001).

Perry also argues for the first time that the Texas death penalty scheme violates his right to due process because it does not provide for meaningful appellate review of the mitigation special issue. Petition at 22. Relying on *Clemons v. Mississippi*, 494 U.S. 738 (1990), Perry argues that appellate review of the mitigation special issues is warranted because Texas is a "weighing state" in that it requires jurors to weigh the evidence when determining whether a life or death sentence is appropriate. Petition at 22-23. Apart from the fact that Perry has never raised this argument before, the kind of review Perry seeks is not constitutionally mandated.

Perry did not make this argument before the state court on direct appeal, therefore this Court is without jurisdiction to pass on it. The cases are legion that this Court will not decide issues raised

for the first time on petition for certiorari, and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Therefore this Court is without jurisdiction to address this argument now and should deny certiorari for this reason.

Regardless, Perry's argument does not warrant certiorari review because Texas is not considered a "weighing state." *See Stringer v. Black*, 503 U.S. 222, 232-33 (1992) (citing to *Lowenfield v. Phelps*, 484 U.S. 231, 241-42 (1988)) (noting that Louisiana scheme, similar to Texas, does not require jury to weigh aggravating and mitigating factors). Therefore, the authority Perry cites is inapplicable. Furthermore, this Court has never held that the Constitution entitles a capital defendant to a particular type of appellate review, nor that an appellate court must re-determine the jury's verdict on punishment.[2] As a matter of state law, Texas has chosen to review the sufficiency of the evidence supporting the jury's affirmative response to the future dangerousness special issue under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See e.g., Hughes v. State*, 897 S.W.2d 285, 291 (Tex. Crim. App. 1994); *Livingston v. State*, 739 S.W.2d 311, 339-40 (Tex. Crim. App. 1987). Such a standard, with its emphasis on the rationality of the verdict, is more than adequate to ensure that the jury did not impose the death penalty arbitrarily or capriciously. *Cf. Lewis v. Jeffers*, 497 U.S. 764, 782 (1990). By providing prompt, judicial review of the jury's decision, "Texas has provided a means to promote the evenhanded, rational, and consistent

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[2] In fact, this Court upheld the constitutionality of the Texas capital sentencing scheme, including its provisions for appellate review, even though the statute is silent regarding the exact nature of the appeal. *Pulley v. Harris*, 465 U.S. 37, 53 n.15 (1984)(citing *Jurek v. Texas*, 428 U.S. 262, 269 (1976)).

imposition of death sentences under law." *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

No appellate review of the jury's answers to Texas' punishment-phase special issues is constitutionally required, because the Constitution permits standardless discretion to impose the death penalty once the defendant has been found eligible for a death sentence. *Cf. Tuilaepa v. California*, 512 U.S. 967 (1994). Under the Texas capital sentencing scheme, the jury's determination of guilt ensures that the defendant comes within the narrowed class of death-eligible defendants. *Jurek v. Texas*, 428 U.S. at 270. The jury then performs the "selection" function by determining whether the death-eligible defendant should in fact receive that sentence by answering the punishment phase special issues. Given that "complete jury discretion is constitutionally permissible" in the selection determination, *Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998), reviewing a Texas jury's selection decision is simply not constitutionally mandated. Once a defendant is determined to be death-eligible, the Eighth Amendment requirements for the selection decision are satisfied if the procedures "allow the jury to consider the character and record of the defendant and the circumstances of the crime." *Tuilaepa*, 512 U.S. at 972. In this regard, the Eighth Amendment's prohibition against arbitrary and capricious action in imposing the death sentence is not implicated by a lack of appellate review of the jury's "selection" determination. *Id.* at 979-80; *Caldwell v. Mississippi*, 472 U.S. 320, 330-31 (1985). Accordingly, this Court has never held that the Constitution entitles a capital defendant to have a redetermination on appeal of the death sentence once properly found to be death-eligible. *See McCleskey v. Kemp*, 481 U.S. 279, 308 (1987); *Pulley v. Harris*, 465 U.S. 37, 45-46 (1984); *see and compare Lewis v. Jeffers*, 497 U.S. 764 (1990) ("eligibility" determination is reviewable; "If a State's aggravating circumstances adequately perform their constitutional function [the eligibility determination], then a state court's application of those circumstances raises, apart from due process and Eighth

Amendment concerns, only a question of the proper application of state law.").

Perry fails to set forth a compelling reason for granting certiorari review of his claim. Therefore, such review is unnecessary and should be denied.

III. Certiorari Review Should Be Denied Because the "Moral Blameworthiness" Definition of "Mitigating Evidence" Does Not Unconstitutionally Limit the Jury's Consideration of Evidence.

Perry argues that the supplemental jury instruction submitted pursuant to Tex. Code of Crim. Proc. Art. 37.071 § 2(f)(4), limiting mitigating evidence to that which a juror might regard as reducing a defendant's moral blameworthiness, unconstitutionally limits what mitigating evidence the jury may consider because it instructs jurors to consider some mitigating evidence but not all, in violation of *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*").[3] Perry argues that the jury may have disregarded his mitigation case because it equated "moral blameworthiness" with his already proven guilt, or could have concluded that his evidence of "family mental illness or drug and

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[3] Special Issue Two read as follows:

> Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, is there a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

4 CR 605. The jury was additionally instructed, in compliance with Art. 37.071 § 2(f)(4), that, "[i]n arriving at your answer, you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." 4 CR 601.

alcohol abuse had no bearing on his moral blameworthiness for the murder he committed." Petition at 28.

Perry raised this issue on direct appeal, relying on *Tennard v. Dretke*, 124 S. Ct. 2562 (2004). The state court properly overruled this point of error, concluding that it had previously decided that "the mitigation special issue 'does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness.'" *Perry*, 158 S.W.3d at 449 (citing *Cantu v. State*, 939 S.W.2d 627, 648-49 (Tex. Crim. App. 1997)). The state court concluded that the *Tennard* decision, decided under another statutory scheme which did not include a mitigation special issue, does not hold otherwise. *Perry*, 158 S.W.3d at 449; *see Tennard*, 124 S. Ct. at 2569-72. Certiorari review of this decision is unnecessary because, by defining mitigation evidence as that which a juror considers to reduce a defendant's moral blameworthiness, Texas law does not offend the Constitution.

This Court has consistently held that "the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." *Tennard*, 124 S. Ct. at 2570 (citing *Boyde v. California*, 494 U.S. 370, 377-378 (1990)); *see also Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"); *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) ("We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death .... [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances" (quoting *Eddings*, 455 U.S. at 114). The mitigating value of constitutionally relevant evidence, as actually proffered at trial, must be within "the effective reach" of the jury in responding to the statutory punishment issues and instructions. *Johnson v. Texas*, 509 U.S. 350, 368 (1993); *Graham v. Collins*, 506 U.S. 461, 475 (1993).

Although relevant mitigating evidence may not be placed beyond the effective reach of the sentencer, the Constitution does not require unfettered sentencing discretion in the jury, and a state may guide the sentencer's consideration of mitigating evidence in an effort to achieve a more rational and equitable result. *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998); *Tuilaepa v. California*, 512 U.S. 967, 971(1994); *Johnson,* 509 U.S. at 362. Thus, there is no requirement that a jury be allowed to give effect to mitigating evidence *in every conceivable manner in which the evidence might be relevant. Johnson*, 509 U.S. at 372. If mitigating evidence is within the effective reach of the jury, the fact that a defendant can identify mitigating value beyond the scope of the statutory issues does not require the submission of an additional issue or instruction allowing the jury to give further mitigating effect to the evidence. *Id.*; *Graham*, 506 U.S. at 474; *see also Boyde,* 494 U.S. at 382 n.5 (defendant is entitled only to fair vehicle by which sentencer can give effect to mitigating force of his evidence). Mitigating evidence is beyond the effective reach of the sentencer only if there exists a "reasonable likelihood that t[he] jurors would have deemed themselves *foreclosed* from considering [the mitigating evidence]" in answering the special punishment issues submitted to the jury. *Johnson*, 509 U.S. at 369 (emphasis added); *see Penry I,* 492 U.S. at 315-29 (jury was prevented from giving *any* mitigating effect to the evidence); *see also Saffle v. Parks*, 494 U.S. 484, 491-92 (1989) (same). The defect identified in *Penry I* and again in *Penry II* was that the jury was prevented from giving *any* mitigating effect to the evidence. *See Saffle*, 494 U.S. at 489; *Penry II,* 532 U.S. at 800. This defect did not occur in Perry's case.

It is entirely possible for the jury to find, under the mitigation instruction given, that any evidence of "family mental illness or drug and alcohol abuse" reduced Perry's moral blameworthiness for the crime. The jury could have concluded that the crime was the result of those influences and he was, thus, not morally culpable for his behavior. This Court has recognized that "virtually any mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability'

apart from its relevance to the particular concerns embodied in the Texas special issues." *Graham v. Collins*, 506 U.S. 461, 476 (1993).

Perry speculates that the jury improperly disregarded this evidence because the jury may have concluded that the evidence had no bearing on his moral blameworthiness. Petition at 28. However, the fact that the jury ultimately concluded that none of his mitigating evidence was sufficient to reduce his moral blameworthiness does not mean that the jury was precluded from considering such evidence. Indeed, it does not appear that Perry actually suffered from mental illness, or that he was under the influence of drugs and alcohol at the time of the crime, *see* Petition at 28 n.106, thus the jury could have concluded that it was not relevant to Perry's moral blameworthiness for this crime. This Court has recognized in *Skipper v. South Carolina* that not everything a defendant introduces in mitigation of punishment is "relevant mitigating evidence." 476 U.S. 1, 7 n.2 (1986). Evidence of a defendant's character or background attains constitutionally mitigating relevance to his culpability for the crime only if it reflects a reduced culpability, *i.e.*, that the capital murder is to some degree attributable to those aspects of his character or background proffered in mitigation of punishment:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse .... Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

Franklin v. Lynaugh, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (quoting *California v. Brown*, 479 U.S. 538, 545

(1987) (emphasis in original)); *see also Penry I*, 492 U.S. at 319 (noting that it is well settled that "punishment should be directly related to the personal culpability of the criminal defendant . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime.") (citation omitted); *Saffle*, 494 U.S. at 492-93 (holding that "[i]t is no doubt constitutionally permissible, if not constitutionally required . . . for the State to insist that the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence.") (internal citations and quotes omitted).

While the jury may have found his evidence unpersuasive, Perry has failed to prove that the jury was precluded from considering it, or that the jury simply disregarded it. This Court has previously approved the mitigation special issue as currently worded, *see Penry II*, 532 U.S. at 803, and made no mention of fault in the supplemental instruction. Therefore, certiorari review of this claim is unwarranted.

CONCLUSION

For the foregoing reasons, the Court should deny Perry's petition for writ of certiorari.

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In The
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MICHAEL JAMES PERRY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. Texas' Mitigation Issue Is Unconstitutional ... 1

1. Texas Fails To Demand That Jurors Be Certain About Their Decision On the Mitigation Special Issue 1

2. The Jury Must Answer Texas' Mitigation Issue Negatively Before It May Impose A Death Sentence 3

3. Texas Conducts No Appellate Review of the Mitigation Special Issue 6

B. Texas' Capital Sentencing Statute Unconstitutionally Limits the Mitigating Evidence the Jury May Consider 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000) 4

Blakely v. Washington, 124 S. Ct. 2531 (2004) 4

Boyde v. California, 494 U.S. 370 (1990) 9

Eddings v. Oklahoma, 455 U.S. 104 (1982) 8

Ex parte Steven Kenneth Staley, 160 S.W.3d 56 (Tex. Crim. App. 2005) 5

Franklin v. Lynaugh, 487 U.S. 164 (1988) 7

Furman v. Georgia, 408 U.S. 238 (1972) 2, 3

Johnson v. State, 59 P.3d 450 (Nev. 2002) 4, 5

Johnson v. Texas, 509 U.S. 350 (1993) 10

Jurek v. Texas, 428 U.S. 262 (1976) 6, 7

Lowenfield v. Phelps, 484 U.S. 231 (1988) 7

McGautha v. California, 402 U.S. 183 (1971) 3

Olsen v. State, 67 P.3d 536 (Wyo. 2003) 5, 7

Penry v. Johnson, 532 U.S. 782 (2001) 10

Penry v. Lynaugh, 492 U.S. 302 (1989) 10

People v. Tenneson, 788 P.2d 786 (Colo. 1990) 5

Richmond v. Lewis, 506 U.S. 40 (1992) 7

Ring v. Arizona, 536 U.S. 584 (2002) 4

Smith v. Texas, 125 S. Ct. 400 (2004) 10

State v. Cole, 155 S.W.3d 885 (Tenn. 2005) 4

State v. Marsh, 102 P.3d 445 (Kan. 2005), *cert. granted*, May 31, 2005 9

TABLE OF AUTHORITIES – Continued

Page

State v. McDougall, 301 S.E.2d 308 (N.C. 1983), *cert. denied*, 464 U.S. 865 (1983) 5

State v. Rizzo, 833 A.2d 363 (Conn. 2003) 5

State v. Whitfield, 107 S.W.3d 253 (Mo. 2003) 5

Stringer v. Black, 503 U.S. 222 (1992) 7

Tennard v. Dretke, 542 U.S. 274 (2004) 10

Tuilaepa v. California, 512 U.S. 967 (1994) 7

United States v. Sampson, 335 F. Supp. 2d 166 (D. Mass. 2004) 6

STATUTES

ARIZ. REV. STAT. ANN. § 13-703(E) (1989) 7

ARK. CODE ANN. § 5-4-603(a)(2) (2005) 5

N.J. STAT. ANN. § 2C:11-3(c)(3)(a) and (b) (2005) 5

N.Y. CRIM. PROC. LAW § 400.27(11)(a) (2005) 5

OHIO REV. CODE ANN. § 2929.03(D)(1) (2005) 5

TENN. CODE ANN. § 39-13-204(g)(1)(B) (2005) 5

TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2 (Vernon Supp. 2004-05) 3

TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(c) (Vernon Supp. 2004-05) 3

TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1) (Vernon Supp. 2004-05) 3, 5, 7, 8

TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(f)(4) (Vernon Supp. 2004-05) 9

TABLE OF AUTHORITIES – Continued

Page

TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(g) (Vernon Supp. 2004-05) 3

UTAH CODE ANN. § 76-3-207(5)(b) (2005) 5

WASH. REV. CODE § 10-95-060(4) 5

LAW REVIEW ARTICLE

Carol S. Steiker and Jordan M. Steiker, *Let God Sort Them Out? Refining The Individualization Requirement In Capital Sentencing Crossed Over: A Murder, A Memoir. By Beverly Lowry*, 102 Yale L. J. 835 (1992) 3

OTHER

Texas Department of Criminal Justice Statistics, http://www.tdcj.state.tx.us/stat/drowfacts.htm (last visited August 20, 2005) 1

Texas Judicial System Annual Report, Office of Court Administration and the Texas Judicial Council, http://www.courts.state.tx.us/oca/PublicInfo/annual_reports.asp (last visisted August 20, 2005) 6

ARGUMENT

This Court has never directly addressed the question of whether a jury must be certain, beyond a reasonable doubt, that a death sentence is appropriate before deciding to impose it. Texas' Opposition omits any discussion of this central point.

Texas leads the nation in the number of executions since this Court reinstated the death penalty in 1976.[1] Numerous decisions by this Court over the last thirty years have dramatically changed the way in which the government may impose the death sentence. All those changes, at their core, are concerned with ensuring that the jury is certain beyond a reasonable doubt that death is the appropriate sentence.

This level of certainty is not demanded under the current Texas capital sentencing procedure, which treats a defendant's mitigating evidence as an afterthought. The Texas system gives no guidance to the jury as to what burden of proof applies to the mitigation question, allows poor jury instructions that further undermine the jury's consideration of mitigating factors, and provides no appellate review of the manner in which the jury treats the mitigating evidence. Such a situation virtually guarantees that the application of the death penalty in Texas will be freakish, wanton and arbitrary. In this case, the Texas scheme denied Michael James Perry his right to have the jury fully and fairly consider the mitigating evidence that should have resulted in a sentence of life imprisonment instead of death.

A. Texas' Mitigation Issue Is Unconstitutional

1. Texas Fails To Demand That Jurors Be Certain About Their Decision On the Mitigation Special Issue

Texas' principle response to the Petition is that mitigating evidence should not and cannot be subject to any standard of presentation, proof or review. This response is

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[1] Texas Department of Criminal Justice Statistics, http://www.tdcj.state.tx.us/stat/drowfacts.htm (last visited August 20, 2005).

wrong as a matter of experience and principle. On the practical level, of the thirty-one states that require the jury to engage in a comparison of the aggravating and mitigating circumstances at the sentencing stage, sixteen of those states also require that the jury be certain, either beyond a reasonable doubt (fourteen states) or by a preponderance of the evidence (two states), that the mitigating factors do not warrant a sentence of life imprisonment.[2] Those states have gotten it right as a matter of constitutional principle.

The reasonable doubt standard is an instructional concept aimed at conveying to the jury the level or degree of subjective certitude that it must have in order to render a verdict in favor of the party with the burden of proof. The standard of proof represents an attempt to instruct the jury on the degree of confidence our society thinks it should have in the correctness of its conclusions. The standard also allocates the risk of error between the litigants, indicates the relative importance of the ultimate decision, minimizes the risk of error, and gives the jury guidance regarding the sense of the solemnity of the task and the degree of certitude that it must have in order to reach a certain decision. As this Court has noted, the greater the social cost of an erroneous outcome in a particular type of litigation, the higher the standard of proof the law applies to that litigation.[3]

Texas argues that specific standards for balancing aggravating and mitigating circumstances are not constitutionally required.[4] This contention misses the point, however, because it does not address the burden of proof issue or the demand for certainty underlying in the burden requirement. The question is what level of *certitude* the jury must have in reaching its conclusion. Texas' argument for total jury discretion[5] amounts to a return to the unfettered and "openended

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[2] *See infra* note 25.

[3] *Furman v. Georgia*, 408 U.S. 238, 306 (1972) ("[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability.").

[4] Opposition, 11-12.

[5] Opposition, 7-10.

discretion in capital sentencing that began in the 1960's and [should have] culminated in *Furman v. Georgia*."[6]

2. The Jury Must Answer Texas' Mitigation Issue Negatively Before It May Impose A Death Sentence

A jury must make three findings under Texas' death penalty statute: 1) the defendant is guilty of a capital offense; 2) the defendant will be a continuing threat to society; and 3) the mitigating factors are not sufficient to warrant a sentence of life imprisonment.[7] The first two findings must be proven by the state beyond a reasonable doubt.[8] The mitigation special issue places no burden on the state and provides no instruction to the jurors about the level of certainty they need to have in their conclusion.[9]

Texas initially argues that a defendant is already eligible for the death sentence by the time the jury reaches the mitigation special issue, and therefore, no burden is required.[10] This is wrong. The jury may impose a sentence of death *only* if it answers the mitigation issue negatively. If the jury cannot reach a decision on the mitigation special issue, then the court *must* sentence the defendant to life imprisonment.[11] As in *Ring*, if the jury reaches a negative finding on mitigation special issue, then the

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[6] *See* Carol S. Steiker and Jordan M. Steiker, *Let God Sort Them Out? Refining The Individualization Requirement In Capital Sentencing Crossed Over: A Murder, A Memoir. By Beverly Lowry*, 102 Yale L. J. 835, 863-64 (1992) (citing *Furman v. Georgia*, 408 U.S. 238 (1972)); Brief Amici Curiae of the NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent at 69, *McGautha v. California*, 402 U.S. 183 (1971) (No. 203) (In the words of the NAACP Legal Defense Fund, " 'Kill him if you want' and 'Kill him, but you may spare him if you want' mean the same thing in any man's language.").

[7] TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2 (Vernon Supp. 2004-05).

[8] *Id.* at § 2(c).

[9] *Id.* at § 2(e)(1).

[10] Opposition, 3.

[11] TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(g).

defendant is exposed "to a greater punishment than that authorized by the [jury's] guilty verdict."[12] The mitigation issue thus is similar to the finding of "deliberate cruelty" required by *Blakely v. Washington* to be made by a jury beyond a reasonable doubt.[13] As this Court noted in both *Ring* and *Apprendi*, the proper inquiry into this issue is "one not of form, but of effect."[14]

Texas further claims that the mitigation special issue requires no burden of proof because it is not a factual determination.[15] Yet other courts that have addressed this issue have disagreed with Texas' assessment.[16] Nevada, for instance, requires a finding regarding the weighing of mitigating circumstances before the jury may impose a sentence of death.[17] The Nevada Supreme Court concluded that the mitigation finding is, in part, a factual determination, not merely discretionary weighing, and *Ring* therefore requires a jury to make this finding beyond a reasonable doubt.[18]

Texas also argues that it is impossible to impose a burden of proof on the mitigation issue and that it would be "in the absurd position of proving a negative beyond a reasonable doubt."[19] But at least one Texas court provided the correct instruction before the Legislature intervened

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[12] *Ring v. Arizona*, 536 U.S. 584, 586 (2002).

[13] 124 S. Ct. 2531, 2537 (2004).

[14] *Ring* at 604 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 541 (2000) (O'Connor, J., dissenting)).

[15] *See* Opposition, 7.

[16] *See State v. Cole*, 155 S.W.3d 885, 904 (Tenn. 2005) (treating question whether aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt as "factual questions that determine whether the maximum sentence of death will be imposed").

[17] *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002) ("This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing.").

[18] *Id.*

[19] Opposition, 10.

and passed Section 37.071 § 2(e)(1).[20] The same burden-shifting scheme already exists in many states for affirmative defenses as well.[21] This question is not unique to Texas' death penalty scheme.

The Connecticut Supreme Court, for example, has held that a jury must be certain, beyond a reasonable doubt, that the aggravating factors outweigh the mitigating factors by any amount or degree.[22] The Court concluded that the jury, in examining the aggravating and mitigating factors, is "in effect deciding that death is the appropriate punishment in the case."[23] The Colorado Supreme Court likewise reasoned that the purpose of requiring proof beyond a reasonable doubt is to convey to the jurors "the degree of confidence they must have in the correctness of their ultimate conclusion before they can return a verdict doubt."[24] Thus, many states[25] and federal

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[20] *Ex parte Steven Kenneth Staley*, 160 S.W.3d 56, 59 n.6 (Tex. Crim. App. 2005) ("[T]he jury was explicitly required to find, *beyond a reasonable doubt*, that, even after considering all mitigating evidence and applicant's level of culpability, the penalty of death was still the 'appropriate punishment.' The jury was informed that any reasonable doubt must be resolved in applicant's favor.").

[21] *See Olsen v. State*, 67 P.3d 536, 590 (Wyo. 2003) ("If the jury is to be instructed to "weigh," the defendant must produce proof of mitigating circumstances; however, just as in affirmative defenses, the burden of negating this mitigating evidence by proof beyond a reasonable doubt remains with the State.").

[22] *State v. Rizzo*, 833 A.2d 363, 410-11 (Conn. 2003).

[23] *Id.*

[24] *People v. Tenneson*, 788 P.2d 786, 796 (Colo. 1990).

[25] ARK. CODE ANN. § 5-4-603(a)(2) (2005); *Tenneson*, 788 P.2d at 796; *Rizzo*, 833 A.2d at 410-11; *State v. Whitfield*, 107 S.W.3d 253, 259-60 (Mo. 2003); *Johnson*, 59 P.3d at 460; *State v. McDougall*, 301 S.E.2d 308, 326 (N.C. 1983); N.J. STAT. ANN. § 2C:11-3(c)(3)(a) and (b) (2005); N.Y. CRIM. PROC. LAW § 400.27(11)(a) (2005); OHIO REV. CODE ANN. § 2929.03(D)(1) (2005); TENN. CODE ANN. § 39-13-204(g)(1)(B) (2005); UTAH CODE ANN. § 76-3-207(5)(b) (2005); WASH. REV. CODE § 10-95-060(4); *Olsen*, 67 P.3d at 590.

courts[26] have imposed a burden of proof on the mitigation issue because to do otherwise relieves the government of its burden.

3. Texas Conducts No Appellate Review of the Mitigation Special Issue

Of the 253 death penalty direct appeals decided by the Texas Court of Criminal Appeals from 1999 to 2004, only 4 were reversed or remanded – and none were reversed or remanded because of any concern about the jury's finding on mitigating evidence.[27] Texas has basically abdicated its responsibility to review death penalty sentences when it comes to the mitigation special issue.[28] The State's only response is that it is not a weighing state and, even if it were a weighing state, standardless review (*i.e.*, no review) is allowed once the defendant has been found guilty of a capital offense.[29]

This response comes despite the State's assurances in *Jurek* that the Texas courts' "prompt judicial review of the jury's decision" would provide the "means to promote the

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[26] *See United States v. Sampson*, 335 F. Supp. 2d 166, 238-39 n.42 (D. Mass. 2004) (imposing reasonable doubt standard on prosecution in weighing process). The district court in *Sampson* noted:

> The lower courts are split on whether to instruct that the government must prove beyond a reasonable doubt that the death penalty is justified. The defendant cited cases in which the instruction was given and the government cited cases in which it was not. Judge Sand's model jury instructions contain "beyond a reasonable doubt" language while the Eighth Circuit's model jury instructions do not. *See* 1 Leonard B. Sand *et al.*, Modern Federal Jury Instructions, Inst. 9A-19 at 9A-78 to -79; Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction 12.11.

[27] *See* Texas Judicial System Annual Report, Office of Court Administration and the Texas Judicial Council, http://www.courts.state.tx.us/oca/PublicInfo/annual_reports.asp (last visited August 20, 2005).

[28] Petition, 17.

[29] Opposition, 11-12.

evenhanded, rational, and consistent imposition of death sentences under law."[30] This review cannot be perfunctory: "The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision."[31] But today, all review in Texas is absent.

Texas' argument that it is not required to conduct any appellate review because Texas is not a weighing state is contradicted by its characterization of Section 37.071 § 2(e)(1) in its prior briefing.[32] In its Opposition, Texas relies on *Stringer v. Black* and *Lowenfield v. Phelps*,[33] but fails to acknowledge that in both cases the Court was referring to the Texas statute as it existed prior to 1991, when the Texas Legislature added Section 37.071 § 2(e)(1) in response to *Penry I*. The mere fact that Texas chooses not to use the word "weigh" in its statute does not mean that Texas is not a weighing state.[34] Even prior to Texas adding Section 37.071 § 2(e)(1), this Court concluded that there was no practical difference between those states that explicitly require the jury to "weigh" the factors and the Texas scheme.[35]

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[30] *Jurek v. Texas*, 428 U.S. 262, 266 (1976).

[31] *Tuilaepa v.* California, 512 U.S. 967, 973 (1994).

[32] Against its current approach, Texas argued in the Court of Criminal Appeals that "[t]he weighing process required by the mitigating issue is purely judgmental and no burden of proof is required." Appellate Brief to the Court of Criminal Appeals, 57-60.

[33] Opposition, 11 (citing *Stringer v. Black*, 503 U.S. 222 (1992), and *Lowenfield v. Phelps*, 484 U.S. 231 (1988)).

[34] Petition, 22-23; *see Richmond v. Lewis*, 506 U.S. 40, 47 (1992) (Arizona was a weighing state, despite the fact that the term "weighing" was not included in the statute); *Olsen*, 67 P.3d at 572-73. *See* ARIZ. REV. STAT. ANN. § 13-703(E) (1989) ("In determining whether to impose a sentence of death . . . the court shall take into account the aggravating and mitigating circumstances included in . . . this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency.").

[35] *Franklin v. Lynaugh*, 487 U.S. 164, 183 n.12 (1988) ("We also repeat our previous acknowledgment, that – as a practical matter – a Texas capital jury deliberating over the Special Issues is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it

(Continued on following page)

Texas' other defense for its lack of review is that "the Constitution permits standardless discretion to impose the death penalty once the defendant has been found eligible for a death sentence."[36] In none of the cases cited by Texas, however, does this Court support the proposition that a state can refuse to provide *any* review of a jury's finding on a sentencing phase issue.[37] And Texas cannot rely on its minimum level of review of the future dangerousness issue,[38] which involves the same kind of subjective determinations as the mitigation special issue. The constitutional import of Texas' refusal to provide any appellate review is that it makes the jury's consideration of the mitigating evidence almost meaningless, especially in light of the confusing supplemental instruction limiting what mitigating evidence the jury can consider.

B. Texas' Capital Sentencing Statute Unconstitutionally Limits the Mitigating Evidence the Jury May Consider

The jury must be able to give *full effect* to all relevant mitigating evidence.[39] Viewed in its best light, the Texas capital sentencing statute is confusing and contradictory. Viewed in practice, it unconstitutionally denies capital defendants the right to have *all* of their relevant mitigating evidence considered by the jury.

The mitigation special issue requires the jury to consider "all the evidence, including the circumstances of the offense, the defendant's character and background, *and* the personal moral culpability of the defendant"[40]

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formulates these answers in a manner similar to that employed by capital juries in 'pure balancing' States. Thus, the differences between the two systems may be even less than it appears at first examination.").

[36] Opposition, 12.

[37] *Id.*

[38] Opposition, 11.

[39] *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (holding that the sentencer must consider "any relevant mitigating evidence").

[40] TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1) (emphasis added).

when considering whether the mitigating evidence is sufficient to warrant a sentence of life imprisonment. Inexplicably, the supplemental instruction then limits "mitigating evidence" to only that evidence which "a juror might regard as *reducing the defendant's moral blameworthiness.*"[41] By its plain terms, the instruction specifically carves out from the jury's consideration "all the evidence," "the circumstances of the offense," and "the defendant's background and character." Any other reading would render the supplemental instruction in Section 37.071 § 2(f)(4) superfluous.

Perhaps this is not what Texas intended by the instruction, but as demonstrated in the Petition, this is the way the prosecution and the jury understood the instruction in Perry's case. The Petition showed that at least one juror was, in fact, confused by the second special issue.[42] The jurors could have believed that if the mitigating and aggravating factors were of equal weight – *i.e.*, in equipoise – then they were obligated to impose a sentence of death.[43] Some could have believed that the mitigating factors had to be overwhelming in order to be sufficient – there is no way we can know for sure. The prosecutor responded to this expressed confusion by reading the misleading supplemental instruction to the jury. The confused jurors were, at best, still confused, and, at worst, unconstitutionally constrained from considering and giving full effect to *all* of the relevant mitigation evidence presented. A misled jury following the instructions would have certainly foreclosed the opportunity of considering mitigation evidence not related to Perry's "moral responsibility" for the crime. Therefore, there was a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence."[44]

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[41] *Id.* § 2(f)(4) (emphasis added).

[42] Reporter's Record Vol. 7, pp. 36-38.

[43] *See State v. Marsh*, 102 P.3d 445 (Kan. 2005), *cert. granted*, May 31, 2005 (holding such a scheme unconstitutional under federal law).

[44] *Boyde v. California*, 494 U.S. 370, 380 (1990).

This Court's recent decision in *Smith v. Texas* reinforces the requirement that a jury be able to give "*full* consideration and *full* effect to mitigating circumstances."[45] Texas cites *Johnson v. Texas* numerous times for the proposition that the jury need not fully consider all of the relevant mitigating evidence so long as it is allowed to give "some" effect to the evidence presented.[46] Texas neglects to mention that this Court has consistently adopted Justice O'Connor's dissent in *Johnson* as the precedent from the case, rather than the majority's opinion.[47] Under the standard articulated in *Smith*, the jury was improperly prohibited from giving full effect to all relevant mitigating circumstances, both due to the statute's limiting instruction, the prosecution's attempted clarification and the jury's confusion.

Texas is fully aware that the mitigation special issue consistently confuses jurors, as the prosecutor understood when he stated that "everyone gets that look [of puzzlement] when they read the second special issue."[48] There is good reason to believe that Texas will not act to remedy this situation until forced to do so by this Court.[49] Perry therefore respectfully requests that the Court emphasize once again the importance of juror certainty in deciding matters of life and death.

CONCLUSION

Petitioner Michael James Perry respectfully prays that this Honorable Court grant a writ of certiorari and review the judgment of the Texas Court of Criminals Appeals.

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[45] *Smith v. Texas*, 125 S. Ct. 400, 401 (2004) (per curiam) (citing *Penry II*, 532 U.S. at 797) (emphasis in original).

[46] *See, e.g.*, Opposition, 15 (citing *Johnson v. Texas*, 509 U.S. 350, 369 (1993)).

[47] *See, e.g., Penry II*, 532 U.S. at 797 (citing *Johnson*, 509 U.S. at 381).

[48] *See* Reporter's Record Vol. 7, pp. 36-38.

[49] *See Tennard v. Dretke*, 542 U.S. 274 (2004); *Smith v. Texas*, 125 S. Ct. 400, 401 (2004); *Penry v. Johnson*, 532 U.S. 782 (2001); *Penry v. Lynaugh*, 492 U.S. 302 (1989).

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